IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-331

TOLEDO, PEORIA & WESTERN RAILROAD,

Petitioner,

vs.

BURLINGTON NORTHERN INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

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INTRODUCTORY STATEMENT

Toledo, Peoria & Western Railroad petitions this Court for a writ of certiorari to review the judgment and opinion of the Appellate Court of Illinois, Third Judicial District. In the alternative, Petitioner petitions this Court to direct the Illinois Supreme Court to hear Petitioner's Appeal as a Matter of Right.

OPINION BELOW

The opinion of the Appellate Court of Illinois, Third Judicial District is reported at 67 Ill.App.3d 928 and at 385 N.E.2d 937 (1979) and is appended hereto at pages 5a to 14a. Pursuant to Illinois Supreme Court Rule 317 (App. 3), Petitioner filed a Petition for Appeal as a Matter of Right or in the Alternative, Petition for Leave to Appeal in the Supreme Court of Illinois. (App. 4). The Supreme Court of Illinois issued an order denying the Petition for Leave to Appeal. (App. 5). Thereafter, Petitioner filed a motion requesting the Illinois Supreme Court to rule on the Petition for Appeal as a Matter of Right. (App. 6). The Illinois Supreme Court denied the motion for a ruling. (App. 7).

JURISDICTION

The judgment of The Appellate Court of Illinois, Third Judicial District, was entered on February 14, 1979. Petitioner's timely Petition for Leave to Appeal was denied by the Supreme Court of Illinois on May 31, 1979. The Supreme Court of Illinois, by order dated June 27, 1979, refused to rule on Petitioner's Petition for Appeal as a Matter of Right. This Petition for Certiorari was filed within 90 days of the day of the denial of Petitioner's Petition for Leave to Appeal. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

At the conclusion of a trial lasting three weeks, during which more than 1,600 pages of testimony were presented and some 220 documentary and photographic exhibits introduced into evidence, Petitioner received a jury verdict in its favor on each of two separate causes of action, set forth in the two counts of its amended complaint (App. 1, pp. 1a, 2a). In addition, the jury answered two special interrogatories in favor of the plaintiff. (App. 1, pp. 3a, 4a). The Appellate Court found no error by the trial court in the admission of evidence, the conduct of the trial, or the instruction of the jury, but nevertheless reversed summarily, substituting its own judgment on disputed fact questions for the verdicts of the jury which heard the evidence. The Illinois Supreme Court refused to hear Petitioner's appeal, even though that Court's own rules grant said review as a matter of right. This presents two questions for review:

1. Did the Appellate and Supreme Courts of Illinois deprive Petitioner of its constitutional right to due process of law?
2. Did the Appellate and Supreme Courts of Illinois deprive Petitioner of its constitutional right to equal protection of the law?

APPLICABLE CONSTITUTIONAL PROVISIONS

The constitutional provisions applicable to this case are contained in Art. 1, § 13 of the Illinois Constitution and § 1 of Amendment XIV of the United States Constitution as follows:

> "The right of trial by jury as heretofore enjoyed shall remain inviolate. (Ill. Const. Art. 1, § 13)
>
> "Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Constitution of the United States, Amendment XIV)

STATEMENT OF THE CASE

Petitioner, a common carrier railroad, instituted this action in the Illinois Circuit Court of the Tenth Judicial Circuit, Peoria County, to recover damages resulting from the derailment of one of its freight trains in Crescent City, Illinois, on June 21, 1970. The derailment and resulting fires had caused damage to the plaintiff's own property and had caused substantial personal injury and property damage to the residents of Crescent City. All third party damage claims had been settled prior to the time of trial, and therefore, the amount of the damages was liquidated. The cause of the derailment and resultant damage was a "hot box," the failure of a "journal bearing," which was part of car CB&Q 182544, a railroad car manufactured, rebuilt and owned by Burlington Northern, Inc., respondent herein. The complaint was filed against Burlington Northern in two counts: Count I applied the theory of strict liability in tort; Count II was in common law negligence.

The trial lasted three weeks, involved some 1,600 pages of testimony and some 220 documentary and photographic exhibits. At the conclusion of the trial, the jury was instructed by the court in accordance with instructions tendered by the defendant on the substantive issues. At the close of the trial, after deliberating approximately seven hours, the jury returned the following verdicts:

> "We, the jury, find for the plaintiff and against the defendant as to Count I of the Complaint. We assess the damages in the sum of $1,787,491.05."
>
> "We, the jury, find for the plaintiff and against the defendant as to Count II of the Complaint. We assess the damages in the sum of $1,787,491.05."

In answer to two special interrogatories tendered by the defendant, the jury found that plaintiff was not contributorily negligent and that the defendant did rebuild the railroad car in question in February of 1969, sixteen months before the accident. (The verdicts and special interrogatories are set out at Appendix 1, pages 1a to 4a).

After polling of the jury, the trial court entered judgment in favor of plaintiff in the amount of $1,787,491.05 on the jury's verdicts and special findings. Defendant's post-trial motions were denied.

Defendant appealed to the Appellate Court of Illinois for the Third Judicial District, and on February 14, 1979, that court issued an opinion reversing the $1,787,491.05 judgment entered in favor of plaintiff on the verdicts of the jury. The Appellate Court summarily set aside the judgment entered in favor of the plaintiff on the jury verdicts and entered judgment in favor of defendant. The Appellate Court found no error by the trial court in the conduct of the trial but nonetheless issued its opinion holding that:

1. Defendant was not negligent in rebuilding the car;
2. The car was not defective or unreasonably dangerous;
3. Plaintiff assumed the risk of the defective car.

Upon receipt of this opinion, plaintiff filed a Petition for Appeal as a Matter of Right to the Illinois Supreme Court, pointing out that the action of the Appellate Court in reversing the verdicts and special findings of the jury on factual issues deprived Petitioner of its constitutional right to trial by jury. Petitioner also urged that the Appellate Court's opinion deprives plaintiff of its constitutional rights to due process and equal

protection of the law. Illinois Supreme Court Rule 317 expressly grants a right to appeal to that Court as follows:

> Appeals from the Appellate Court shall lie to the Supreme Court *as a matter of right* in cases in which a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court. (App. 3, *emphasis added*)

In the alternative, Petitioner asked for leave to appeal, pointing out conflicts between this decision of the court and decisions of other appellate districts in the State on questions of state common law. The Illinois Supreme Court, by order dated May 31, 1979, denied the alternative Petition for Leave to Appeal, but was silent on the principal petition, the Petition for Appeal as a Matter of Right. (App. 5). Petitioner moved the Illinois Supreme Court to rule on its Petition for Appeal as a Matter of Right. (App. 6). The court denied the motion, refusing to rule on the Appeal as a Matter of Right. (App. 7).

This Petition for Writ of Certiorari follows.

HOW THE FEDERAL QUESTIONS WERE PRESENTED

The federal questions herein arose for the first time by the action of the Appellate Court. These issues were the subject of the Petitioner's Petition for Appeal as a Matter of Right (App. 4) which the Illinois Supreme Court refused to rule upon. (App. 7).

REASONS FOR GRANTING THE WRIT

I.

THE ILLINOIS APPELLATE AND SUPREME COURTS VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

The right to trial by jury has historically been considered so important that it was made part of the original Bill of Rights (U.S. Const. Amend. VII). The Illinois Constitution also recognizes that "the right of trial by jury as heretofore enjoyed shall remain inviolate." (Ill. Const. Art. I, § 13). Despite the fact that this basic and fundamental right is guaranteed by both the Federal and State Constitutions, the Appellate Court of Illinois, Third Judicial District, denied that right to Petitioner by sweeping aside two jury verdicts and the special findings consistent therewith and substituting its view of the evidence instead. In doing so, as Petitioner will demonstrate in detail, *infra*, the Illinois Appellate Court refused to follow the standard enunciated by this Court in *Tennant v. Peoria & P.U. Ry.*, 321 U.S. 29 (1944) and the standards for judicial review established by the Illinois Supreme Court in *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967) and reaffirmed by *Jardine v. Arthur Rubloff*, 73 Ill. 2d 31, 36 (1978), as follows:

> In our judgment verdicts ought to be directed and judgments n.o.v. entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand. 37 Ill. 2d at 510.

Ignoring this Court's admonitions that "courts are not free to reweigh the evidence," (*Tennant v. Peoria & P.U. Ry., supra*) the Appellate Court of Illinois substituted its judgment for that of the jury on three disputed factual issues, finding for the defendant in each case. In so doing, it clearly violated Petitioner's right to due process of law as guaranteed by Amendment XIV of the United States Constitution.

A. The Evidence Supported The Jury's Verdict On The Issue Of Whether Defendant's Acts And Omissions During The 1969 Rebuilding Of Car CB&Q 182544 Constituted A Failure To Exercise Ordinary Care.

Plaintiff's negligence case was based on evidence which "when viewed in its aspect most favorable" to plaintiff, *Pedrick v. Peoria & Eastern R.R. Co., supra*, established the following:

1) In 1969 Burlington brought car CB&Q 182544 into its Havelock, Nebraska, shop for "rebuilding" (A. 407);*

2) In 1969, and for years prior thereto, journal roller bearings were available which greatly reduced the possibility of a journal bearing failure on freight cars and, by the mid-1960's, the entire railroad industry was in the process of converting plain bearing cars to the safer roller bearings (A. 301, 440);

3) Prior to 1969 the AAR (Association of American Railroads) had required that roller bearings be installed exclusively on all new cars built after August 1, 1968 (BE 41) (A. 403);

4) For at least 10 years prior to 1969, Burlington itself had installed roller bearings exclusively on all new freight cars manufactured at its Havelock shops (A. 408);

5) In 1969 Burlington had at its Havelock shop all the equipment necessary to convert to roller

* These references are to the Abstract of Record and Book of Exhibits of the trial.

bearings and subsequently made roller bearing conversions on some of its older freight cars (A. 375, 385, 632);

6) Roller bearing conversion of the car would have been even easier than usual since it was already dismantled and the trucks containing the bearings had been completely removed and disassembled (A. 385);

7) Burlington's own assistant shop superintendent suggested to his superintendent that roller bearings be installed on the car (A. 375, 530);

8) Nevertheless, Burlington saved the cost of conversion and installed obsolete plain bearings on the rebuilt car, thereby exposing the public, including other railroads, to the greater hazards (A. 480);

9) Plaintiff was free from contributory negligence (App. 1, p. 4a);

10) The accident occurred when one of the obsolete plain bearings failed in normal service (A. 457); and

11) The failure to equip the car with roller bearings was a proximate cause of the accident (A. 480).

The Illinois Appellate Court brushed all this evidence aside with a single paragraph:

> "The jury also returned a verdict for plaintiff under Count II which alleged defendant's negligence in rebuilding the hopper car in an unreasonably dangerous and defective condition. As our previous discussion of the evidence indicates, there was no basis for a finding of negligence since the bearing was not physically defective and the design was not unreasonably dangerous but was customarily used within the industry. The fact that some other design might conceivably be safer is not proof of negligence. (*Watts v. Bacon & Van Buskirk Glass Co.* (1959), 18 Ill.2d 182, 163 N.E.2d 425.) Therefore we hold that, as a matter of law, defendant was not negligent, and the judgment must be reversed." (App. 2, p. 13a)

This paragraph does not correctly state the law of Illinois or any other American jurisdiction, and violates the basic principles of judicial review. "Negligence" was defined to the jury as follows:

> "When I use the word "negligence" in these instructions, I mean the failure to do something which a reasonably careful person would do or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence. *The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide."* Plf's Inst. No. 11, A. 152-153, Deft's Inst. No. 34, A. 171, *Emphasis added.*

Yet, despite the standard Illinois Pattern Jury instruction (I.P.I. 2d § 10.01), tendered by both parties, the Illinois Appellate Court took away from this jury its constitutionally protected role as trier of this fact issue.

The issue framed for the jury was clear—Was the defendant's conduct in rebuilding car CB&Q 182544 with obsolete plain bearings in 1969 when a practical and much safer alternative was not only readily available but recommended by the entire industry "something which a reasonably careful person would do?" (I.P.I.2d § 10.01, Plf's Inst. No. 11, A. 152-153, Deft's Inst. No. 34, A. 171).

The jury's verdict in favor of plaintiff on the negligence count of the complaint answered that question and that answer was fully supported by the evidence. The Illinois Appellate Court had no right to overrule the jury's finding in this regard, and by so doing it has denied Petitioner its constitutional right to due process of law.

B. The Evidence Supported The Jury's Finding That Car CB&Q 182544 Was Defective And Unreasonably Dangerous.

Without citing *Pedrick v. Peoria & Eastern R.R. Co.*, *supra*, applying the *Pedrick* test, discussing plaintiff's evidence or analyzing the issue, the Illinois Appellate Court stated: "The design of Car CB&Q 182544 did not create a condition that was unreasonably dangerous to plaintiff." (App. 2, p. 12a) Contrary to this statement, the evidence "viewed to its aspect most favorable to the plaintiff" established that Burlington's installation of failure-prone plain bearings on car CB&Q 182544 in February of 1969—when safer roller bearings had long since been available and recommended throughout the industry, when Burlington for the preceding 10 years had put roller bearings on all its newly manufactured cars—created an *unreasonably* dangerous condition which brought about the instant occurrence, and the jury expressly so found by their separate verdict in favor of plaintiff on the strict liability count of the complaint.

The availability and feasibility of an alternative device or design which, more likely than not, would have prevented the occurrence is the essence of proof in any strict liability design case under Illinois law. *Wells v. Webb Machinery Co.*, 20 Ill.App.3d 545 (1st Dist. 1974); *Rivera v. Rockford Machine & Tool Co.*, 1 Ill.App.3d 641 (1st Dist. 1971); *Gelsumino v. E. W. Bliss Co.*, 10 Ill. App.3d 604 (1st Dist. 1973); *Neil v. Whirl Air Flow Co. Corp.*, 43 Ill.App.3d 266 (3rd Dist. 1976); *Scott v. Dreis & Krump Mfg. Co.*, 26 Ill.App.3d 971 (1st Dist. 1976).

In the recent case of *Anderson v. Hyster Co.*, 74 Ill.2d 364, the Illinois Supreme Court affirmed a strict liability verdict for defective design against a forklift manufacturer, noting at 368:

> "That a product was not reasonably safe by reason of defective design may be proved, *inter alia*, by evidence of the availability and feasibility of alternate designs at the time of its manufacture, or that the design used did not conform with the design standards of the industry, design guidelines provided by an authoritative voluntary association, or design criteria set by legislation or governmental regulation."

Similarly, in the case at bar, plaintiffs' evidence showed *inter alia* that the alternative design (roller bearings) was both feasible and available at the time and place that car CB&Q 182544 was rebuilt and that roller bearings had long since been the "standard" of the industry. The fact that in 1969 no rule or law actually required roller bearings on 70-ton hopper cars was simply an element for the jury to consider. Indeed, in another recent Illinois decision, *Rucker v. Norfolk & W. Ry.*, 64 Ill.App.3d 770, 381 N.E.2d 715 (5th Dist. 1978), the Illinois Appellate Court upheld a strict liability verdict for defective design against a tank car manufacturer for failure to install a protective shield at the head of the car even though such "headshields" were not required by any rule or law and were not at all widely used in the industry.

Here, the evidence showed that the use of an alternative design (roller bearings) would significantly reduce hot box occurrences from all causes, and the evidence was certainly sufficient for the jury to find that the instant derailment would never have occurred if roller bearings had been on the car as Plaintiff's expert expressly testified (A. 480). Illinois courts have repeatedly held that a manufacturer's failure to use an alternative design or an available safety feature on its product presents at least a question of fact for the jury

under the strict liability theory. See *Gelsumino v. E. W. Bliss Co.*, 10 Ill.App.3d 604 (1st Dist. 1974); *Neal v. Whirl Air Flow Corp.*, 43 Ill.App.3d 266 (3d Dist. 1976); *Scott v. Dreis & Krump Mfg. Co.*, 26 Ill.App.3d 971 (1st Dist. 1975); *Rivera v. Rockford Machine & Tool Co., supra*, 1 Ill.App.3d 641 (1st Dist. 1971); *Wells v. Webb Machinery Co., supra*, 29 Ill.App.3d 545 (1st Dist. 1974).

Furthermore, under the Illinois Supreme Court's holding in *Tweedy v. Wright Ford Sales, Inc.*, 64 Ill.2d 570 (1976), a *prima facie* strict liability case is established by proving the failure of the product to perform "in the manner reasonably to be expected in light of its nature and intended function" (64 Ill.2d at 574). See also, *Gillespie v. R. D. Werner Co., Inc., supra*, 71 Ill.2d 318 (1978), reaffirming the *Tweedy* rationale. Moreover, a defective condition is a "condition not contemplated by the ultimate consumer which will be unreasonably dangerous to him." Restatement, Torts 2d § 402A, Comment g. Burlington's own witness established that new plain bearings ought to last 1.5 million miles (A. 594). Instead, four out of the eight bearings on car CB&Q 182544 failed in the first 16,000 miles of use, and the last failure caused the catastrophic derailment at Crescent City. There is no way it can fairly be said that, as a matter of law, a condition where 50% of the bearings fail within 1% of their expected life was a condition "contemplated" by plaintiff, and the Appellate Court's reliance on Restatement, Torts 2d § 402A, comment g, (App. 2, pp. 9a-10a) in reversing the jury verdict as to Count I is misplaced.

In view of this mass of evidence, for the Illinois Appellate Court to hold that "the design of car CB&Q 182544 did not create a condition that was unreasonably dangerous to plaintiff" (App. 2, p. 12a) clearly placed the court in the jury box and made it the trier of fact.

C. The Issue Of Assumption Of The Risk Was For The Jury To Decide.

The issue of assumption of the risk, raised as an affirmative defense to the strict liability count only,* again manifests the Illinois Appellate Court's refusal to follow the proper standard for judicial review. The Illinois Appellate Court stated:

> "At trial there was ample evidence that plaintiff knew full well the risks and dangers of transporting freight cars equipped with solid bearings . . ." (App. 2, p. 10a)

But, "ample evidence" does not satisfy the proper standard for overruling a jury finding. In a strict liability case, assumption of the risk is an affirmative defense to be pleaded and proved by defendant. *Williams v. Brown Mfg.*, 45 Ill.2d 418 (1970). By its verdict in favor of plaintiff on Count I, the jury found that the defense had not been proved. The Illinois Appellate Court was not free to overturn this verdict simply because in its view there was "ample evidence" to support its view of the evidence rather than the jury's. *Tennant, supra*, 329 U.S. 9.

Moreover, while the evidence arguably established that plaintiff knew the car was equipped with plain bearings, the evidence certainly did not establish that plaintiff knew that the car had been completely dismantled and rebuilt in 1969 at facilities equipped to make roller bearing conversions, nor did it establish that plaintiff knew that this particular car had suffered failures in three out of eight plain bearings in its first 16,000 miles of use after being returned to service in

* Assumption of the risk is not a defense to a negligence action in Illinois, *Barrett v. Fritz*, 42 Ill.2d 529 (1969), and defendant did not plead or argue the issue with respect to the negligence count of the complaint (A. 24-26, 167).

1969. In *Karabatsos v. Spivey Co.*, 49 Ill.App.3d 317 (1st Dist. 1977) and *Christopherson v. Hyster Co.*, 58 Ill. App.3d 791 (1st Dist. 1978), the Court affirmed jury verdicts in favor of plaintiffs in strict products liability cases and held as a matter of law that an appreciation of a general possibility of danger does not constitute assumption of risk.

Furthermore, it is well settled that assumption of the risk in a strict liability action is established only if plaintiff "voluntarily and unreasonably" encounters a known risk, *Williams v. Brown Mfg. Co.*, 45 Ill.2d 418, 423 (1970); *Doran v. Pullman Standard Car Mfg. Co.*, 45 Ill.App.3d 981 (1st Dist. 1977); *Scott v. Dreis & Krump Mfg. Co.*, 26 Ill.App.3d 971 (1st Dist. 1975). Although the Association of American Railroad ("AAR") interchange agreement did not obligate Burlington to rebuild plain bearing cars in 1969, it did obligate the plaintiff to accept a car which meets the minimum requirements of these rules. Refusing to accept a car meeting these minimum requirements would effectively put TP&W out of the freight hauling business. But TP&W is not even free to go out of the freight hauling business, for to do so would violate the Interstate Commerce Act, 49 USC §§ 10101, *et seq.*, 11101. Violation of the statute can subject the carrier to suit for damages, including attorney's fees, 49 USC § 11705, and for civil penalties, 49 USC § 11901.

A common carrier railroad can hardly be said to be "unreasonable" in discharging its duty to furnish transportation under Federal law. If a railroad is forced to accept a car which meets certain minimum rules and requirements, having no standing to participate in the decision-making process whereby the rules are drafted because it is not a voting member of the organization

promulgating the rules (see discussion *infra*) it cannot be said as a matter of law to be "voluntary and unreasonably" encountering a known risk. See *Doran v. Pullman Standard Mfg. Co., supra*, 45 Ill.App.3d 981, 989 and *Scott v. Dreis & Krump Mfg. Co.*, 26 Ill.App.3d 971, 990, both holding that job-compulsory activity did not constitute assumption of the risk.

At best, the assumption of risk defense, including the alleged voluntariness and unreasonableness of Plaintiff's conduct, was for the jury to decide. Even if the Illinois Appellate Court were correct in finding "ample evidence" that Plaintiff assumed the risk, the jury's verdict to the contrary cannot be disturbed without violating Petitioner's due process rights.

D. None Of The Authorities Cited By The Illinois Appellate Court Justify Its Rejection Of The Jury's Verdicts.

The Illinois Appellate Court cites three cases, one on the negligence issue and two on the issue of strict liability.

To support its reversal of the negligence verdict, the Appellate Court relies on *Watts v. Bacon & Van Buskirk Glass Co.*, 18 Ill.2d 226 (1959), affirming a directed verdict in favor of a glass manufacturer who had installed plate glass instead of tempered glass in a drug store door in accordance with instructions from the owners of the store. Not only was the glass company simply carrying out a purchase order, but the evidence showed that "plate glass installation was customary and usual while the use of tempered glass was exceptional" (18 Ill.2d at 231). Obviously, the instant case and *Watts* are wholly different cases. Here, the only party who ordered or chose to rebuild car CB&Q 182544 with obsolete plain

bearings was the defendant. Conversion to roller bearings was not exceptional—it was the standard to which the entire railroad industry was attempting to comply! Defendant showed not a single other instance where any railroad in 1969 was still installing plain bearings on any new or rebuilt cars. On the contrary, the evidence showed that other railroads were converting their fleets to roller bearings as fast as was feasible. Defendant itself had installed roller bearings exclusively on all its new cars for the preceding 10 years. In short, the factors establishing the propriety of the directed verdict in *Watts* establish the propriety of the jury verdict in the case at bar.

With respect to the strict liability verdict, the Appellate Court cites *St. Louis S.F. R.R. v. Armco Steel Corp.*, 490 F.2d 367 (8th Cir. 1974) and *Torres v. Southern Pacific Transportation Co.*, 584 F.2d 900 (9th Cir. 1978). *Armco Steel* was not a design case at all, but involved a claim that defendant's wheel contained a manufacturing defect (excessive pitting). The expert opinion on this point was in conflict, the trial court *as fact finder* found in favor of the defendant, and the Court of Appeals affirmed the trial court's findings. If anything, *Armco* supports the submission of the instant case to the jury and affirmance of the jury's verdicts.

Torres involved an action by two trespassing illegal aliens hitching a ride on defendant's freight car who were injured in a hot box derailment. Unlike the case at bar, there was no evidence that any "unreasonable" conduct on the part of the defendant was responsible for the hot box (the type of bearings involved were not even identified), and the case was decided under Arizona law which *unlike Illinois* does not apply the strict liability doctrine to the lessor of a defective chattel (584 F.2d at

902). See *Crowe v. Public Building Commission of Chicago*, 74 Ill.2d 10; *Galluccio v. Hertz Corp.*, 1 Ill. App.3d 272 (5th Dist. 1971); *Knapp v. Hertz Corp.*, 59 Ill.App.3d 241 (1st Dist. 1978).

E. The Actions Of The Illinois Appellate And Supreme Courts Violated Petitioner's Due Process Rights.

In Illinois, civil litigants are granted a constitutionally protected right to a jury trial. Ill. Const. Art. 1, § 13. This right, if it is to have any meaning at all, must include the right that any appellate review of the results of the jury trial be limited by appropriate standards which give the jury verdict its constitutionally protected weight. If Appellate judges are free to overturn any jury verdict simply because they disagree with it, the right has been reduced to a nullity. But here, the decision of the Illinois Appellate Court has violated the constitutional standards for appellate review of jury verdicts, as set forth by this Court:

> "It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Washington & Georgetown R. Co. v. McDade*, 135 U.S. 554, 571, 572; *Tiller v. Atlantic Coast Line R. Co., supra*, 68; *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. *Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.*

> Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for the respondent notwithstanding the verdict *is to deprive petitioner of the right to a jury trial.*" (Emphasis added) *Tennant v. Peoria & P.U. Ry.*, 321 U.S. 29, 35 (1944).

If this case had arisen in the federal court, there is no doubt that the action of the Appellate Court would be held to violate the second clause of the Seventh Amendment which provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." It is anomalous that this Court has never held that the right to jury trial granted by the Seventh Amendment is made applicable to the states by reason of the Fourteenth Amendment, although this Court, in *Duncan v. Louisiana*, 391 U.S. 145 (1968), held that the right to a jury trial contained in the Sixth Amendment so applied. The Court's reasoning in *Duncan* would be equally applicable here:

> The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those " 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' " *Powell v. Alabama*, 287 U.S. 45, 67 (1932); whether it is "basic in our system of jurisprudence," *In re Oliver*, 333 U.S. 257, 273 (1948); and whether it is "a fundamental right, essential to a fair trial," *Gideon v. Wainwright*, 372 U.S. 335, 343-344 (1963); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964); *Pointer v. Texas*, 380 U.S. 400, 403 (1965). The claim before us is that the right to trial by jury guaranteed by the Sixth Amendment meets these tests. The position of Louisiana, on the other hand, is that the Constitution imposes upon the States no duty to give a jury trial in any criminal case, regardless of the seriousness of the crime or the size of the punishment which may be imposed. Because *we believe that trial by jury in criminal cases is fundamental to the American scheme of justice*, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee. 39 U.S. at 148-149 (*emphasis added*).

The right to jury trial in civil cases is no less "fundamental to the American scheme of justice" than in criminal cases, and this Court should expressly so hold.

However, this Court need not go so far as to hold that state civil litigants always and everywhere have the right to trial by jury, for here the Illinois Constitution clearly gives Petitioners that right as a part of the fundamental law of the State. Moreover, the common law of Illinois gives litigants the right to judicial review of jury verdicts guided by constitutionally appropriate standards. *Pedrick v. Peoria & Eastern R.R. Co.*, *supra*, 37 Ill.2d 494, 510 (1976); *Jardine v. Arthur Rubloff*, *supra*, 73 Ill.2d 31, 36 (1978). The issue presented by this Petition is whether the Illinois Appellate and Supreme Courts may violate the Fourteenth Amendment's federal guarantee of due process of law by arbitrarily denying Petitioner its right to standards of appellate review which are consistent with the right to jury trial to which Petitioner was clearly entitled.

Denial of federal due process can be accomplished by a state court, as this Court noted in *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673 (1930):

> The federal guarantee of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government. . . . But, while it is for state courts to determine the adjective as well as the substantive law of the State, they must in so doing, accord the parties due process of law." 281 U.S. at 680-821.

See, also *Shelley v. Kraemer*, 334 U.S. 1, 15 (1948), and cases cited therein. Not only criminal defendants, but civil litigants as well look to the court system for a fair, orderly and just system for the resolution of their disputes. This Court aptly summarized this principle in *Boddie v. Connecticut*, 401 U.S. 371 (1971)

> American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle. 401 U.S. at 375.

Where a state appellate court violates the proper standard for judicial review of a lower court decision, such action is a violation of the procedural due process guarantees of the Fourteenth Amendment to the United States Constitution. *Robinson v. Ariyoshi*, 441 F.Supp. 559 (D. Hawaii, 1977). Here, by overturning a jury verdict after reweighing the evidence, contrary to the proper standard for appellate review, the Illinois Appellate Court denied Petitioner due process. By refusing even to rule upon Petitioner's appeal as a matter of right, contrary to the right expressly granted by its own rules, the Illinois Supreme Court further denied Petitioner a fair hearing on its constitutional questions.

II.

THE APPELLATE COURT'S OPINION DEPRIVES PLAINTIFF OF ITS CONSTITUTIONAL RIGHT TO EQUAL PROTECTON OF LAW.

The Illinois Appellate Court's opinion, besides setting aside two jury verdicts without any basis in law or fact for doing so, also in essence holds that this railroad, regardless of its damage, is not entitled to pursue a remedy and cause of action (strict liability in tort) that is available to all other plaintiffs in the State of Illinois. Such a result is in violation of the equal protection clauses of both the Illinois and U. S. Constitutions. Ill. Const. Art. I, § 2; U. S. Const., Amend. XIV.

Certainly the fact that plaintiff is a business entity and not an individual "member of the general public" (Appellate Court Opinion, p. 11) does not justify unequal treatment or deprive it of its strict liability remedy. Indeed, the posture of this case is not unlike that in *Suvada v. White Motor Co.*, 32 Ill.2d 612 (1965) where the Supreme Court of Illinois adopted the strict liability

doctrine. In *Suvada*, a milk service company was allowed to maintain a strict liability in tort indemnity action against the manufacturer-seller of the milk truck for amounts paid by the milk company in settlement of personal injury suits brought by persons injured in a collision between the milk truck and a bus. In *Liberty Mutual Insur. Co. v. Williams Machine and Tool Co.*, 62 Ill.2d at 77 (1975), the subrogee insurer of a manufacturing corporation, who assembled and sold a defective work platform, settled an injured workman's claim and then was allowed to obtain indemnity under the strict liability doctrine from the company that manufactured the defective hydraulic pump installed on the platform. In *Texaco v. McGrew Lumber Co.*, 117 Ill. App. 2d 351 (1st Dist. 1969), the strict liability doctrine was expressly applied to *two business entities in the same industry*, the court holding that one lumber company in the distributive chain of a defective plank could obtain indemnity from another lumber company which originally supplied the plank (117 Ill. App. 2d at 357-358).

The Appellate Court's opinion also notes the existence of the AAR Interchange Agreement governing the interchange of freight cars between railroads. The interchange agreement, including the duty of the handling railroad to inspect cars received in interchange, was introduced in evidence and argued to the jury. Nothing in the AAR agreement, however, even deals with, much less precludes, one railroad's right to recover under the strict liability theory for damage incurred as a result of an unreasonably dangerous condition of a freight car leased into service by another railroad. In fact, Article 17 of the AAR's plan of organization expressly provides that:

> Article 17. Nothing this plan shall in any way prohibit or restrain any member road from acting individually and independently of the Association or of any and all other member roads with respect to any of the matters covered hereby, and the right of individual and independent action is expressly reserved to each member road. (Supp. BE 50)

The interchange rules themselves were designed to provide a means for prompt payment for repairs to and damage sustained by *freight cars*. (A. 561-562). Beyond this point, the rules do not go. These rules do not attempt to exonerate the car owner from any liability that may result from a dangerous condition on a freight car, which results in personal injuries or property damage sustained *by others*. These rules do not attempt to preclude a "Handling Company" (such as TP&W) from suing a car owner, manufacturer or rebuilder (such as Burlington) for any losses or damage sustained by "Handling Company" as a result of a defective condition of a freight car which was caused or contributed to by the car owner, manufacturer or rebuilder.

Contrary to the instant Illinois Appellate Court decision, other courts that have considered the AAR interchange agreement have interpreted the agreement according to its terms and held that it does *not* preclude common law actions for damages between railroads under any theory. For example, in *Southern Cotton Oil Co. v. Atlantic C.L.R.R.*, 17 F.2d 411 (E.D. Va. 1927) the court held:

> An examination of the rules from beginning to end shows that the purpose of their adoption was, as stated in the preface, to make the car owner chargeable with repairs under certain given circumstances and the railroad chargeable with repairs under certain other given circumstances, and to provide a means of securing the repairs and allocating the cost of same. Elaborate provisions are contained in the rules with relation to the character of equipment of the cars and the method of

handling the cars when defects are discovered, whether loaded or unloaded, and like matters. In other words, *the intent and purpose of the rules is to provide for the interchange of cars, and in no sense do they relate to or were they intended to cover the question of responsibility between the parties* in relation to the contents of the same *or to alter or modify the existing law with relation to such matters.* If, therefore, as the result of a failure to properly inspect a car in transit on its railroad or to handle the same with due care, damage ensues, the railroad company will be liable. If, on the other hand, loss is sustained by some hidden defect in the car, undiscoverable in the exercise of due care, the railroad company will not be responsible. (17 F.2d 411, 413) (*Emphasis added.*)

In *Chicago, R.I.&P. R.R. v. Chicago and N.W. Ry.*, 280 F.2d 110 (8th Cir. 1960), the court held the Interchange Rules did not prevent a railroad in possession of a freight car from suing another railroad for contribution towards the settlement of a claim for personal injuries suffered by an employee of the railroad in possession. The court concluded that the interchange rules:

". . . do not operate as a waiver of or a bar to any claim for indemnity or contribution that the plaintiff might have against the defendant arising out of the mishap." (280 F.2d 110, 113) (Emphasis added)

Most recently in *Maine C. R.R. v. Bangor & A. R.R.*, ... Me. ....., 395 A.2d 1107 (1978), the Maine Supreme Court reached the same conclusion in an action to confirm an arbitrators' award for damages incurred by the Maine Central whose train derailed because of a defect in a Bangor & Aroostook freight car. Both railroads were parties to the AAR Interchange Agreement at the time of the occurrence. After holding at 1132 that the arbitrators "did nothing more than give their authoritative opinion that initial responsibility for the

damaged cars lay with Maine Central", the Court went on to hold that "Maine Central is entitled to pursue its legal remedies with respect to the alleged products liability claim." To the same effect see *Missouri Pacific v. Southern Pacific*, 430 S.W.2d 900 (Tex. App. 1968), holding that one railroad's contractual duty to inspect a car did not prevent it from obtaining indemnity for amounts paid to an injured employee from the railroad that actually supplied the defective car in which the employee was injured.

Different treatment of different entities is constitutionally permissible only where there is "a rational difference of condition or situation existing in the persons or objects upon which the classification rests", *Davis v. Commonwealth Edison Co.*, 61 Ill.2d 494, 497 (1975). Here neither the AAR Agreement nor any other factor justifies treating this Petitioner differently from any other individual or corporate plaintiff by depriving it of the remedy afforded under the strict liability doctrine.

CONCLUSION

If state reviewing courts are free to substitute their judgments on disputed fact issues and thereby overturn jury verdicts reached after trials which are free of reversible error, then the constitutionally guaranteed right to trial by jury has been reduced to a mockery, and due process of law has been denied. The Supreme Court of Illinois, having refused even to hear the case, in violation of the right granted by its own rules, has therefore refused to correct this constitutional depriva-

tion. It thus remains for this Court to reaffirm the rights of litigants to the due process of law guaranteed by the Constitution. If this right is to have any meaning at all, it must include the right to an appellate review of a jury verdict which is restrained by appropriate judicial standards.

Similarly, the nation's railroads are beset with enough problems without bearing the additional burden of discriminatory application of a state common law remedy in such a way as to deny the railroad Plaintiff herein rights granted to every other individual and corporate plaintiff under the law of Illinois. There is no "rational difference of condition" which justifies such a result, and it should not be allowed.

For the same reasons which moved this Court in *Tennant v. Peoria & P.U. Ry., supra*, and other cases cited herein, to protect the rights of litigants from judicial usurpation of the jury's function, and to protect parties from a denial of the equal protection of the laws, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX 1

Verdict as to Count I

C677 Verdict of Jury as to Count I of the complaint, filed October 29, 1976, set forth as follows:

"We, the Jury, find for the plaintiff and against the defendant as to Count I of the complaint. We assess the damages in the sum of $1,787,-491.05."

/s/ Howard W. Bedell
FOREMAN

/s/ Arthur D. Allen

/s/ Herman Heinz

/s/ Toni Werner

/s/ Louisa Weller

/s/ Lucille Ross

/s/ Floy M. Bullock

/s/ Edna Braten

/s/ Ethel Hulbert

/s/ Carol Aton

/s/ Philip G. Maser

/s/ Pete L. Draksler

Verdict as to Count II

C678 Verdict of Jury as to Count II of the complaint, filed October 29, 1976, set forth as follows:

"We, the Jury, find for the plaintiff and against the defendant as to Count II of the complaint. We assess the damages in the sume of $1,787,-491.05."

/s/ Howard W. Bedell
FOREMAN

/s/ Arthur D. Allen

/s/ Herman Heinz

/s/ Toni Werner

/s/ Louisa Weller

/s/ Lucille Ross

/s/ Floy M. Bullock

/s/ Edna Braten

/s/ Ethel Hulbert

/s/ Carol Aton

/s/ Philip G. Maser

/s/ Pete L. Draksler

Special Interrogatory as to Count I

C679 Jury's answer to Special Interrogatory dealing with "rebuilt", filed October 29, 1976, set forth as follows:

You are instructed to answer the following special interrogatory by writing in the blank space either the word "yes" or "no", as you may find. Each juror should sign the interrogatory answer, in the spaces therefor provided at the foot of the page:

With respect to Count I of the complaint, do you find from your consideration of all the evidence and under the instructions of the court that the defendant in February, 1969, rebuilt car CB&Q182544?

Answer: *Yes*

/s/ Howard W. Bedell
FOREMAN

/s/ Arthur D. Allen

/s/ Herman Heinz

/s/ Louisa Weller

/s/ Lucille Ross

/s/ Toni Werner

/s/ Floy M. Bullock

/s/ Edna Braten

/s/ Ethel Hulbert

/s/ Carol Aton

/s/ Philip G. Maser

/s/ Pete L. Draksler

Special Interrogatory as to Count II

C680 Jury's Answer to Special Interrogatory dealing with plaintiff's contributory negligence, filed October 29, 1976, set forth as follows:

You are instructed to answer the following special interrogatory by writing in the blank space either the word "yes" or "no", as you may find. Each juror should sign the interrogatory answer, in the spaces therefor provided at the foot of the page:

With respect to Count II of the complaint, do you find from your consideration of all the evidence and under the instructions of the court that the plaintiff, before and at the time of the occurrence, was guilty of contributory negligence which proximately contributed to cause the alleged damages?

Answer: *No*

/s/ Howard W. Bedell
FOREMAN

/s/ Arthur D. Allen

/s/ Herman Heinz

/s/ Louisa Weller

/s/ Lucille Ross

/s/ Toni Werner

/s/ Floy M. Bullock

/s/ Edna Braten

/s/ Ethel Hulbert

/s/ Carol Aton

/s/ Philip G. Maser

/s/ Pete L. Draksler

APPENDIX 2

In the Appellate Court of Illinois
Third Judicial District

TOLEDO, PEORIA & WESTERN RAILROAD, a corporation,
Plaintiff-Appellee,
No. 77-506 vs.
BURLINGTON NORTHERN, INC., a corporation,
Defendant-Appellant.

Appeal from the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois.

Honorable Albert Pucci, Circuit Judge, Presiding.

Opinion of the Appellate Court of Illinois

MR. JUSTICE STENGEL delivered the opinion of the Court:

Defendant Burlington Northern, Inc., brings this appeal from a judgment for $1,787,500 entered in favor of plaintiff, Toledo, Peoria & Western Railroad, in a product liability action arising out of a 1970 train derailment which caused numerous explosions and extensive damage at Crescent City, Illinois.

After the catastrophic accident, investigators determined that the derailment occurred when a "hot box" caused a wheel to come off a hopper car identified as car CB&Q 182544 and owned by Chicago, Burlington & Quincy Railroad, a predecessor to defendant Burlington Northern,

Inc. In 1946 CB&Q manufactured the 70-ton covered hopper car involved here and equipped it with solid or friction bearings.

The solid bearing assemblies used on railroad cars are composed of the journal, which is the machined end of the axle; a 50-pound bearing positioned over the journal, the wedge, which is located over the bearing to control upward movement; the lubricator pad, which transmits oil to the journal and bearing; and the journal box which encloses all components and also contains the lubricating oil. In operation the journal and axle turn with the wheels and draw oil through the lubricator pad to form a film between the journal and the bearing. Proper function of a solid bearing assembly requires an adequate supply of lubrication, proper positioning of components, and the absence of contaminants. The components can be inspected by opening the journal box lid.

Roller bearings were first developed about 1949 and since 1958 have been used exclusively on all new cars built by CB&Q and later by Burlington. A roller bearing assembly is composed of a journal and a collar consisting of two circular races in which the roller bearings turn. Roller bearing assemblies are sealed units that cannot be viewed on inspection, and they require annual lubrication.

A "hot box" is a fire in a journal box caused by excessive friction. Hot boxes occur with more frequency where solid bearings are used than with roller bearings. The Association of American Railroads has adopted an Interchange Rule which imposes the primary responsibility for inspection and lubrication of all freight cars upon the railroad to which a car has been interchanged. Both plaintiff and defendant had agreed to be bound by the AAR Interchange Rules prior to the accident.

In 1969 the hopper car involved here underwent scheduled maintenance at defendant's plant in Havelock, Nebraska. The solid bearing assemblies were replaced with a new solid bearing assembly, some components of an improved design were added, and the car was given a new number (CB&Q 182544). At that time, it was technologically possible to convert solid bearings to roller bearings, and in fact the Rules of the Association of American Railroads required rebuilt 100-ton cars to be so converted. The Rules also required all new cars to be equipped with roller bearings. However, a 70-ton car like this one was in full compliance with solid bearings. After being rebuilt and prior to the accident at Crescent City, car CB&Q 182544 experienced three bearing failures, but none of these involved the bearing at the L4 wheel position.

On June 20, 1970, car CB&Q 182544 was received by plaintiff railroad at its East Peoria yard, and all the journals were inspected by plaintiff's employees. During the early morning hours of June 21, this car was incorporated into train 20 which was made up of 103 loaded freight cars, 5 empties, 1 caboose, and 4 locomotives. After leaving East Peoria at 3:25 a.m., train 20 proceeded eastward toward its destination at Effner, Indiana. Along the route the four members of the train crew, two of whom rode in the locomotive and two in the caboose, visually inspected the train as it went around curves.

During 1970 plaintiff operated all its trains in accordance with certain rules which required all employees to be constantly on the lookout for hot boxes and for signals from railroaders and the general public. The members of the crew of train 20 insist that they repeatedly watched for smoke or flames during the trip. Railroad employees at Forrest and at Weston, Illinois, gave the crew of train 20 a "highball" sign indicating that everything was in order. Crew members saw a similar "highball" sign given by an Illinois Central operator at Gilman, Illinois, which

is only a few miles from the scene of the accident; however, one-half block east of the Gilman depot, a man waiting to cross the tracks saw flames shooting out from the wheel of a car on the north side of the train but he was unable to give a warning. Another man waiting for the train to pass the Route 45 crossing on the east edge of Gilman also saw a flaming hot box on a front wheel of a hopper car. He tried to signal to a crewman in the caboose, but the crewman did not appear to see him. The train hauled car 182544 another eight miles until the journal and bearing on the L4 wheel burned off, the side frame dropped to the track, and finally the entire car bounced into the air at the Route 49 crossing on the west edge of Crescent City. The lead wheels came down off the track and ran on the ties about 1,000 feet, causing the general derailment which followed. At that point the train automatically went into an emergency stop. A tank car filled with liquid propane gas exploded almost at once followed later by additional explosions which caused numerous fires and inflicted severe damage to persons and property in Crescent City. Plaintiff eventually settled all damage claims for a total of $1,755,400 and also expended $32,000 for damage to its own track and equipment.

In this product liability action against defendant, plaintiff seeks to recover in tort, under Count I on a theory of strict liability and, under Count II on a theory of negligence, for the rebuilding of car CB&Q 182544 in an unreasonably dangerous and defective condition.

At the trial by jury plaintiff did not adduce evidence of any manufacturing or physical defect in the bearing assembly of car CB&Q 182544, but did introduce evidence relating to the general risks or dangers of hot boxes occurring when solid bearings are used. The jury was instructed that the issue under Count I was whether, at the time the car left the control of defendant after being

rebuilt, there existed a condition which rendered the car unreasonably dangerous in that it was equipped with solid bearings rather than with roller bearings. The issue under Count II was stated to be whether defendant was negligent in failing to equip the car with roller bearings in 1969. The jury was also instructed as to defendant's affirmative defenses to Count I based on misuse and assumption of the risk.

Motions for directed verdicts filed by both parties were denied by the court, and after the case was submitted to the jury, verdicts were returned in favor of plaintiff as to both Count I and Count II. Damages were assessed at $1,787,491.05. In response to two special interrogatories the jury found that defendant did "rebuild" car CB&Q 182544 in 1969, thus rejecting defendant's argument that the car was merely repaired, and the jury found that plaintiff was not guilty of contributory negligence. After the trial court denied defendant's post-trial motion, this appeal followed.

Defendant has raised a multiplicity of issues, but because we conclude that judgment should have been entered for defendant as a matter of law, we shall discuss only those issues necessary to our decision.

Illinois first recognized strict liability in tort for defective products in 1965 and has generally adopted the elements of a strict liability action set out in Restatement (Second) of Torts §402A. Plaintiff must prove that an unreasonably dangerous condition existed in a product at the time the product left the control of the seller or the manufacturer and that the condition was the proximate result of plaintiff's injury or damage. (*Suvada* v. *White Motor Co.* (1965), 32 Ill. 2d 612, 210 N.E.2d 182.) As is noted in Comment *g* of the Restatement, a defective condition is a "condition not contemplated by the ultimate consumer which will be unreasonably dangerous to him."

(Restatement of Torts (Second) §402A, Comment *g* at 351; *Dunham* v. *Vaughan & Bushnell Mfg. Co.* (1969), 42 Ill. 2d 339, 247 N.E.2d 401.) The justification for imposing strict liability is that the public interest in human life and health demands the protection of law against the sale of defective products. Since the seller and the manufacturer solicit and invite use of a product by advertising, any losses to the user should be borne by those who created the risk and reaped the profit by placing the product in the stream of commerce. *Suvada.*

Under Count I of the complaint, plaintiff asserted that solid bearings were unreasonably dangerous on this 70-ton hopper car, considering the risk of hot boxes and the availability of roller bearings, and therefore the defendant should be held strictly liable for damages which were caused by the bearing failure. Thus plaintiff, a railroad user of car CB&Q 182544, is seeking to recover from defendant, a railroad rebuilder of the car, for damages resulting from a derailment caused by an undetected hot box in the bearing assembly on one of the car's wheels. At trial there was ample evidence that plaintiff knew full well the risks and dangers of transporting freight cars equipped with solid bearings and that plaintiff, through its employees, repeatedly inspected all its trains, including train 20, for just such a hot box occurrence. Plaintiff admitted that it owned and operated cars with solid bearings and was still using such cars at the time of trial, six years after the accident. Plaintiff's vice-president in charge of operations testified that company rules required employees to be constantly on the lookout for hot boxes and for distress signals from bystanders. Furthermore the alleged defect here was not a concealed physical flaw but purely a matter of design known to plaintiff when the car was accepted for interchange.

In a strict liability action brought in federal court by a railroad against the manufacturer of a wheel which failed in use, causing a derailment with resulting damages of $745,000, the trial court denied recovery and found that the plaintiff railroad "fully contemplated all the characteristics of the wheel in question and that the wheel was neither defective nor unreasonably dangerous." (*St. Louis-San Francisco Ry.* v. *Armco Steel Corp.* (E.D. Mo. 1973), 359 F. Supp. 760, 762.) On appeal the United States Court of Appeals for the Eighth Circuit affirmed, commenting that plaintiff was not in the position of "an unwary railway passenger," and that plaintiff's employees regularly inspected wheels for cracks caused by metal fatigue. (*St. Louis-San Francisco Ry.* v. *Armco Steel Corp.* (8th Cir. 1974), 490 F. 2d 367, *cert. denied* 417 U.S. 969, 94 S. Ct. 3173.) The court also observed:

> "[Plaintiff] is, in effect, urging this Court to go beyond the doctrine of strict liability and hold that [defendant] is an insurer and, thus, responsible in damages to a railway company whenever one of its wheels fails. We respond negatively to the urging." 490 F. 2d at 370.

Similarly we think plaintiff in the case at bar seeks to hold defendant responsible as an insurer for any damages resulting from a bearing failure on one of its rebuilt cars. Not only would such a result do violence to the theory underlying strict liability, but it would also fly in the face of the contractual duty undertaken by plaintiff when it agreed to be bound by the A.A.R. Interchange Rules that required plaintiff to inspect, lubricate, and be responsible for the condition of all cars on its line.

Plaintiff argues that defendant has erroneously sought to equate plaintiff's position with that of a purchaser who furnishes design specifications to a manufacturer when in fact plaintiff did not "choose" the solid bearing design

utilized by defendant. Plaintiff also says that it should not be bound by A.A.R. standards because it was not a voting member of the Association in 1970. Plaintiff overlooks the fact that it voluntarily agreed to "abide by the Code of Rules governing the *condition of, repairs to,* and settlement for freight cars for the interchange of traffic as formulated by * * *" the A.A.R. Also plaintiff was a voting member of the Association until September 1, 1968, and the bearing standards were adopted prior to that date.

We conclude therefore that, as a matter of law, the design of car CB&Q 182544 did not create a condition that was unreasonably dangerous to plaintiff, and on the basis of the undisputed facts in the record, it was error to submit this case to the jury.

We believe a reversal is also necessary because the evidence shows that, as a matter of law, plaintiff assumed the risk of danger by accepting the car in interchange with full knowledge of the hazards involved. The Supreme Court of Illinois has stated that, in product liability actions, assumption of the risk is a bar to recovery "if the plaintiff is aware of the product defect and voluntarily proceeds in disregard of the known danger." (*Court* v. *Grzelinski* (1978), 72 Ill. 2d 141, 379 N.E.2d 281, 284; *Williams* v. *Brown Mfg. Co.* (1970), 45 Ill. 2d 418, 261 N.E.2d 305.) In *Prince* v. *Gallis Mfg. Co.* (3d Dist. 1978), 58 Ill. App. 3d 1056, 374 N.E.2d 1318, a coal miner, who used a roof bolting machine without a wrench retainer after being warned of the danger, was injured when the wrench flew out of the machine and struck him in the face. This court ruled that the defense of assumption of the risk was established as a matter of law, thus barring recovery under a strict liability theory. *Accord, Fore* v. *Vermeer Mfg. Co.* (3rd Dist. 1972), 7 Ill. App. 3d 346, 287 N.E.2d 526.

In the case at bar, the testimony of plaintiff's own witnesses is clear and uncontradicted that plaintiff was fully aware of the hazard of a hot box occurring on cars equipped with solid bearings. Plaintiff owned 550 cars with solid bearings in 1970 and had considerable experience with hot boxes. Furthermore, prior to June 21, 1970, plaintiff had determined that a hot box detection device should be installed on the track at a point just west of Gilman, and after the accident did install one at that location. Assumption of the risk is a matter of law where, as here, the facts are undisputed and reasonable men would not differ as to the conclusion to be drawn. *Fore* v. *Vermeer Mfg. Co.* (3d Dist. 1972), 7 Ill. App. 3d 346, 287 N.E.2d 526; 65A C.J.S. *Negligence* § 251(2) (1966).

On the basis of the record, we believe plaintiff is barred from recovery under strict liability by its assumption of the risk when it undertook to transport car CB&Q 182544 with knowledge of its solid bearings and the attendant dangers. Having assumed the risk, plaintiff must bear the loss.

The jury also returned a verdict for plaintiff under Count II which alleged defendant's negligence in rebuilding the hopper car in an unreasonably dangerous and defective condition. As our previous discussion of the evidence indicates, there was no basis for a finding of negligence since the bearing was not physically defective and the design was not unreasonably dangerous but was customarily used within the industry. The fact that some other design might conceivably be safer is not proof of negligence. (*Watts* v. *Bacon & Van Buskirk Glass Co.* (1959), 18 Ill. 2d 182, 163 N.E.2d 425.) Therefore we hold that, as a matter of law, defendant was not negligent, and the judgment must be reversed.

The defendant has submitted as additional authority several recent product liability decisions, including *Crowe* v. *Public Bldg. Com. of Chicago,* Docket No. 50258, (Sept. Term 1978), ... Ill. 2d ....., ... N.E.2d .....; *Hunt* v. *Blasius,* Docket No. 50404 (Sept. Term 1978), ... Ill. 2d ....., ... N.E.2d .....; *Sipari* v. *Villa Olivia Country Club* (1st Dist. 1978), 63 Ill. App. 3d 985, 380 N.E.2d 819. We have also noted a tank car explosion case where recovery was allowed and was based upon a theory of strict liability because of a defective design. (*Rucker* v. *Norfolk & W. Ry. Co.,* (5th Dist. 1978), ... Ill. App. 3d ....., 381 N.E.2d 715.) All of these cases are generally distinguishable from the case at bar because in all of them the plaintiff is either an employee or a member of the general public while in the instant case plaintiff is a railroad with the same expertise and knowledge of the characteristics of solid bearings as defendant. We find more helpful the observation of the court in the recent case of *Torres* v. *Southern Pacific Transportation Co.* (9th Cir. 1978), 584 F. 2d 900, that the interchange of railroad cars is a highly specialized industry use which is too dissimilar to the commercial distribution of a product to warrant application of the doctrine of strict liability. In *Torres,* the reviewing court affirmed a summary judgment in favor of the railroad-owner of a freight car which developed a hot box while being operated by another railroad. In the resulting derailment two trespassers riding on another car were injured.

Accordingly, we reverse the judgment of the Circuit Court of Peoria County.

Reversed.

SCOTT, P.J., and STOUDER, J., concur.

APPENDIX 3

Illinois Supreme Court Rule 317

317. (Supreme Court Rule 317). Appeals from the Appellate Court to the Supreme Court as of Right

Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right in cases in which a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court. The appeal shall be initiated by filing a petition in the form prescribed by Rule 315, except that the petition shall be entitled "Petition for Appeal as a Matter of Right," item (1) of the petition shall state that the appeal is taken as a matter of right, and item (5) shall contain argument as to why appeal to the Supreme Court lies as a matter of right. In other respects the procedure is governed by Rule 315. If leave to appeal is to be sought in the alternative, the requests therefor must be included in the same petition, and item (1) thereof shall include an alternative prayer for leave to appeal, and item (5) the argument as to why in the alternative leave to appeal should be allowed as a matter of sound judicial discretion. When both appeal as a matter of right and leave to appeal are sought, both requests will be disposed of by a single order. If the court allows the petition, excerpts from record or an abstract and briefs shall be filed as provided in the case of appeal by leave under Rule 315.

APPENDIX 4

Petition for Appeal as a Matter of Right or, in the Alternative, Petition for Leave to Appeal

In the

Supreme Court of Illinois

TOLEDO, PEORIA & WESTERN RAILROAD, a corporation,
Plaintiff, Petitioner (Appellee Below),

No. 51806 vs.

BURLINGTON NORTHERN, INC., a corporation,
Defendant, Respondent (Appellant Below).

Petition for Appeal as a Matter of Right or, in the Alternative, Petition for Leave to Appeal from the Appellate Court of Illinois, Third District. There Heard on Appeal from the Circuit Court of Peoria County. Honorable Albert Pucci, Judge Presiding.

PETITION FOR APPEAL AS A MATTER OF RIGHT OR, IN THE ALTERNATIVE, PETITION FOR LEAVE TO APPEAL

To The Honorable Justices Of The Supreme Court Of Illinois:

Your petitioner, Toledo, Peoria & Western Railroad, a corporation, respectfully takes this appeal as a matter of right, or in the alternative, prays for leave to appeal from the decision of the Appellate Court of Illinois, Third Judicial District, reversing outright the $1,787,491.05 judgment entered in the Circuit Court on the verdicts and special findings of the jury in favor of Petitioner. A copy of the opinion of the Appellate Court is included herein as Appendix A.

Petitioner prays that the opinion of the Appellate Court be reversed and that the judgment of the Circuit Court be affirmed.

JURISDICTIONAL STATEMENT

The opinion of the Appellate Court was filed December 29, 1978. Plaintiff's petition for rehearing was filed on January 19, 1979. On February 14, 1979, the Appellate Court entered the following order:

> Opinion heretofore filed in the above case is recalled and withdrawn and the revised opinion is filed herein. Petition for Rehearing with respect to the prior opinion which has been recalled is DENIED.

POINTS RELIED UPON FOR REVERSAL

This is a case that was tried to a jury for three weeks on both counts of plaintiff's complaint—negligence and strict liability. More than 1600 pages of testimony were presented and some 220 documentary and photographic exhibits were introduced in evidence. The issues of negligence and strict liability were submitted to the jury under instructions drafted and tendered by defendant (A. 165-166), which included its defenses of contributory negligence, assumption of risk and misuse. The jury returned separate $1,787,491.05 verdicts in favor of plaintiff on each count of the complaint, the trial judge entered judgment on the verdicts and denied defendant's post trial motions.

The Appellate Court summarily reversed the judgment entered on the verdicts and entered judgment in favor of defendant.

APPEAL AS A MATTER OF RIGHT

I.

BY SUMMARILY REVERSING THE JUDGMENT ENTERED ON THE VERDICTS AND SPECIAL FINDINGS OF THE JURY, THE APPELLATE COURT HAS DEPRIVED PETITIONER OF ITS CONSTITUTIONAL RIGHT TO TRIAL BY JURY.

A. The Evidence Supported The Jury's Verdict On The Issue Of Whether Defendant's Acts And Omissions During The 1969 Rebuilding Of Car CB&Q 182544 Constituted A Failure To Exercise Ordinary Care.

B. The Evidence Supported The Jury's Finding That Car CB&Q 182544 Was Defective And Unreasonably Dangerous.

C. The Issue Of Assumption Of Risk Was For The Jury To Decide.

D. None Of The Authorities Cited By The Appellate Court Justify Its Rejection Of The Jury's Verdicts.

II.

THE APPELLATE COURT'S OPINION DEPRIVES PLAINTIFF OF ITS CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF LAW.

PETITION FOR LEAVE TO APPEAL

I.

THE APPELLATE COURT'S OPINION CONFLICTS WITH DECISIONS OF OTHER APPELLATE DISTRICTS IN THIS STATE.

A. Illinois Decisions Consistently Hold That Contractual Defenses To Strict Liability Actions Are Not Recognized.

B. This Decision Creates A Direct Conflict Between The Third And Fifth Districts.

STATEMENT OF FACTS

Because the Appellate Court set aside two separate and independent jury verdicts, one finding in favor of plaintiff on the negligence count of its complaint and the other finding in favor of plaintiff on the strict product liability count, a full statement of facts is in order in this petition.

In February 1969, defendant rebuilt a 70-ton hopper car (CB&Q 182544) that it had originally manufactured in 1946. In the rebuilding process, the eight journal bearings on the car were replaced with a similar bearing known as a "plain bearing," even though a newer and safer bearing known as a "roller bearing" was available and had for the preceding 10 years been installed on every new freight car manufactured by Burlington. Thereafter, unknown to plaintiff, three of these plain bearings failed during the car's first 16,000 miles of service. The fourth failure, on June 21, 1970, caused the Crescent City derailment for which the plaintiff brought the instant action.

Train No. 20, June 21, 1970

TP&W Train No. 20, consisting of four locomotive units and 108 cars, left Peoria early in the morning of June 21, 1970, en route to Effner, Indiana. CB&Q 182544 was the 20th car behind the engines. Behind car 182544 were several tank cars carrying liquified petroleum gas, (A. 292; BE 8), commonly known as LPG, a highly explosive commodity when exposed to sparks, fire or heat.

After leaving Peoria, the train proceeded easterly in a routine manner. En route it was inspected three times as it

rolled past employees of the TP&W, Norfolk and Western and Illinois Central. None of these railroaders detected any problems with the train, and all gave the crew of train 20 a "highball sign," an indication that the train was in good order (A. 178, 180, 184, 187, 197-198, 200, 210-211, 214-215, 355, 360).

The train crew itself also periodically inspected the train in the normal fashion from their respective locations in the engine and the caboose and observed nothing unusual (A. 178-183, 186-192, 196-207, 218-221).

The Derailment

Some time before Train No. 20 reached Crescent City, a "hot box" occurred at the plain journal bearing on the left, or north, side of the fourth axle (the "L4" journal) of car CB&Q 182544. The hot box caused the end of the journal to "burn off" from the axle with the result that the wheel came off the track derailing car 182544 as well as 16 other cars, including 10 tank cars, that were behind it (A. 229-234, 263-272, 281-284, 292, 315, 324) (Pl. Exs. 70-81, 85-89) (BE 8-10). One witness testified that he saw the hot box as the train passed through the east portion of Gilman about daybreak, but he was unable to communicate it to the crew (A. 577-582). The first notice the crew had of something unusual was at approximately 6:30 a.m. when the train brakes went into emergency and one of the tank cars immediately exploded (A. 175, 184-185, 193, 208). The explosions continued after the train came to a stop, causing fires which lasted through June 23, 1970, and scattering debris, fire and ruin throughout the town (A. 244-255) (Supp. BE 53-55).

The Damages

The derailment and ensuing explosions and fire caused extensive damage to persons and property in Crescent City (Supp. BE 13-41, 53-55). Shortly after the occurrence, TP&W set up an office at Crescent City to process damage claims resulting from the occurrence (A. 427). All such claims were promptly settled without lawsuits being filed except for certain bodily injury claims brought by firemen called to fight the fires.* The payments made by TP&W to settle third party claims totalled $1,755,401.66 (Supp. BE 13-36), and the reasonableness of this amount has not been challenged by Burlington. In addition, TP&W incurred $32,089.39 damages resulting from the destruction, necessary repair and replacement of its own track and equipment, and other such expenses arising from the occurrence (Supp. BE 39-41) (A. 425).

General History and Definition of Terms

In railroad terminology, a "journal" is that portion of a railroad car axle which extends outside the wheels (see photo, BE 7). The wheels are pressed on the axle, and the wheels, axle and journal turn as one unit (A. 274-275). Two axle/wheel/journal sets are contained in one unit called a "truck" (see photo, Supp. BE 56). The truck is attached to the car body through a swivel and pin arrangement at the center line of the car (A. 279-280). Each car rides on two trucks, for a total of four axles, eight wheels and eight journals per car (A. 242-243) (Supp. BE 56, 57).

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* TP&W has successfully asserted defenses to these claims and no money has been paid. *See, e.g., Young* v. *TP&W*, 46 Ill.App. 3d 167 (3rd Dist. 1977).

A "journal bearing" is applied to each journal to transmit the weight of the car to the journal and to permit the wheels, axles and journals to rotate freely relative to the rest of the truck (A. 276). The journal and bearing are enclosed in a "journal box" which surrounds and protects the moving parts (see photo, BE 18) (A. 242-243, 276).

For years, the only type of journal bearing in use was the "plain" or "friction" bearing. Plain bearings are curved pieces of metal consisting mostly of brass which fit over the top of the journal (A. 276) (see photo, BE 4). Since in this design, movement of the freight car causes the journal to rotate against the surface of the bearing, a quantity of oil must be placed in the bottom of the journal box, along with a lubricator pad designed to apply the oil in a thin film to the underside of the journal and the inside surface of the bearing (A. 276, 637-639) (see photo, BE 18). As the journal rotates, this oil is carried around the circumference of the journal and is intended to form a protective, lubricating barrier between the journal and bearing (A. 242-244, 276-280, 459-462, 641).

Problem of Plain Bearings—"Hot Boxes"

For proper operation of a plain bearing, the thin oil film applied to the journal by the lubricator pad must always be strong enough to support the weight of the car under conditions of both static and dynamic load (A. 464-468). If for any reason this oil film breaks down, the rotating steel journal will rub directly against the metal bearing causing friction and heat which in turn can lead to a further deterioration of the lubrication and ultimately a destruction of the bearing and "burn off" of the entire journal (A. 612). This lubrication breakdown and resulting

friction and heat at the journal is known in railroading terminology as a "hot box."

Hot boxes have been a serious problem in the railroad industry for many years despite technological advances in the design and manufacture of plain bearings (A. 409). Studies demonstrated that the hot box problem was inherent in the plain bearing design simply because the normal forces reasonably to be expected in ordinary railroad operations over good track can still result in dynamic loads at the journal higher than the oil film between the journal and the bearing can tolerate (A. 465-471). Costly hot box detectors were developed (A. 551-557), but experience demonstrated that they were not as reliable as human observation in detecting hot boxes on moving trains (A. 565).

Development and Acceptance of Roller Bearings—a Safer Alternative

In reaction to the continuing hot box problem inherent in the plain bearing design, a new bearing known as a "roller bearing" was developed in the 1950's and 1960's (A. 607-608, 612), and subsequently manufactured by at least six different companies (A. 510). A roller bearing consists of a ring of cylinders or rollers that surround the journal. When a roller bearing car moves, these rollers or cylinders roll against a collar pressed on the journal thus greatly reducing the friction and heat buildup which can occur with plain bearings (A. 473-474, 608-609). Also, because roller bearings do not require inspection, labor costs can be saved (A. 611).

The success of the roller bearing design and its solution of the hot box problem was such that by the mid-

1960's there was a nationwide effort by the railroad industry to convert by stages the entire national car fleet from the older, plain bearings to the newer and safer roller bearings (A. 301, 440). By the end of 1970, some 656,911 freight cars had been equipped with roller bearings (BE 41). As stated by Burlington's own representative on the Mechanical Division of the Association of American Railroads (AAR), "there was a growing awareness in the industry that roller bearing cars were less subject to failure than friction bearing cars" (A. 404). The AAR adopted rules requiring the installation of roller bearings exclusively on all new cars built after August 1, 1968, and on all cars rebuilt (in accordance with the AAR definition of that term) after January 1, 1970 (BE 41) (A. 403-404). The AAR further required that as of January 1, 1973, all plain bearing freight cars of 100 tons or more must be "retrofitted" with roller bearings (BE 41) (A. 404).

Long before the AAR acted on the problem, the railroads themselves took action. The L&N Railroad, for example, undertook a program to convert its 70 ton covered hopper car fleet to roller bearings in late 1967 (A. 440). Burlington itself began installing roller bearings exclusively on all new freight cars manufactured at its Havelock shops in 1958 (A. 378, 408).

History of Burlington Car CB&Q 182544

Once CB&Q 182544 was identified as the cause of the Crescent City derailment (a fact which Burlington does not dispute), the car's history was investigated (Supp. BE 1). The 70-ton covered hopper car* was manufactured by

* Designed to carry bulk commodities, such as sand, cement, etc. (A. 407) (see photo, Supp. BE 57).

the Chicago, Burlington and Quincy Railroad (CB&Q) in 1946 and given car number 180477 (A. 369). Since roller bearings were not generally available for freight cars in 1946 (A. 404), the car was manufactured with plain journal bearings. Thereafter, the car operated in railroad service until February of 1969 when, together with 300 other Burlington cars most in need of repair, it was returned to Burlington's Havelock, Nebraska, shops where Burlington did extensive work on it and gave it a new number—CB&Q 182544 (A. 407). Burlington's own internal correspondence referred to the February 1969, work as "rebuilding" or "reconstruction" of the car (A. 405-406) (BE 28-31), and the jury expressly found that Burlington "in February 1969, rebuilt car CB&Q 182544" (A. 112-113).

The various items of the car that were either repaired or replaced by Burlington in February of 1969 occupy many pages of the record (BE 20-31) (A. 365-377) and included the wheels, hatch covers and rods, draft arm and center sill, bolster plate, coupler and uncoupler levers, the draft gear, air brakes, end sills and end posts, handholds, and roping staples. Most importantly, each of the trucks containing the wheels, journals and axles were completely removed and dismantled and all eight plain journal bearings on the car were removed and replaced (A. 373-374). However, despite the on-going industry effort to convert to roller bearings, defendant Burlington installed plain bearings on the rebuilt car even though:

1) Burlington had exclusively installed roller bearings on all new cars manufactured at Havelock since 1958 (A. 378, 408);

2) Burlington had available all the equipment necessary to convert to roller bearings in February of 1969 (A. 385) and subsequently made roller bearing conversions on its older freight cars (A. 375, 632);

3) The roller bearing conversion would have been relatively easy at this time since the car was already dismantled and the trucks were already removed and disassembled (A. 385); and

4) Burlington's own Assistant Shop Superintendent at some time suggested to the Superintendent, Car Department, that roller bearings be installed (A. 375, 530).

After rebuilding and renumbering, Burlington released the car back into general service where it was either used by Burlington or leased to other shippers and other railroads in return for a daily ("per diem") rental payment to Burlington by the using railroad or industry (A. 424) (BE 32-40) (Supp. BE 10-12).

History of 182544 After Rebuilding

Between the time car CB&Q 182544 left the Havelock shops in February of 1969 and the Crescent City derailment on June 21, 1970, it traveled 16,623 miles, of which 8,140 were loaded and 8,483 were empty (BE 32-40) (A. 399). During this first 16 months of use after rebuilding, the car suffered five broken springs and three broken bearings (Supp. BE 4-9) (A. 411), even though the expected service life of each of the new plain journal bearings, established by Burlington's expert witness, was approximately 1,500,000 miles (A. 594). There was no evidence that anyone connected with the TP&W knew that any of these failures had occurred.

Events Immediately Preceding the Crescent City Derailment

In early evening of June 20, 1970, some 35 railroad cars, including car CB&Q 182544 loaded with industrial sand,

were delivered to the TP&W at East Peoria, Illinois, by the Peoria & Pekin Union Railroad Company (P&PU) (A. 328, 428) (Supp. BE 3, 12). The car had been part of a train operated by the Burlington from Oregon, Illinois to Galesburg, Illinois. Burlington had inspected the car, including the journal bearings, twice on June 19 in its Galesburg yard and found everything in good order (A. 412-413). The Burlington then moved it from Galesburg to Peoria, and delivered it to the P&PU without any indication of mishandling (A. 642-643). The P&PU also would have given the car the standard interchange inspection (A. 319).

At East Peoria two TP&W car inspectors conducted the standard interchange inspection of each car to check for broken bearings, low oil, contaminants, etc. (A. 332-351) and found nothing out of order. After the inspection, CB&Q 182544 was added to other cars to make up TP&W train No. 20 (Supp. BE 2) and after a routine outbound inspection, the train departed for Effner, Indiana. There was no evidence that the hot box or any other adverse condition was observable while the car was in the East Peoria Yards.

Cause of the Hot Box

The experts for both sides were of the opinion that the hot box and resulting derailment at Crescent City were caused by a rupture or failure of the oil film between the journal and the plain bearing (A. 457, 622). When this lubrication broke down, it resulted in metal-to-metal contact between the bearing and the inside of the journal. TP&W's expert further testified that the failure was caused by dynamic loads experienced in normal service (A. 457) and that Burlington's installation of "obsolete" plain bear-

ings on the car in February, 1969 caused an "unnecessary risk" (A. 497) and created an "unreasonably dangerous" condition (A. 478) that brought about the accident which, in his opinion, would not have happened if roller bearings had been installed on the car at that time (A. 480).

Verdicts, Findings, and Judgment Below

On October 29, 1976 the jury returned the following verdicts in favor of plaintiff:

> "We, the Jury, find for the plaintiff and against the defendant as to Count I of the complaint. We assess the damages in the sum of $1,787,491.05."
>
> "We, the Jury, find for the plaintiff and against the defendant as to Count II of the complaint. We assess the damages in the sum of $1,787,491.05." (A. 111-112)

Also, in answer to two special interrogatories tendered by defendant, the jury expressly found that plaintiff was not contributorily negligent and that the defendant did "rebuild" car CB&Q 182544 in February of 1969.

After polling of the jury, judgment in favor of plaintiff in the amount of $1,787,491.05 was entered on the jury's verdicts and special findings (A. 114, 115). Defendant's post-trial motions were denied (A. 145).

Appellate Court Summarily Reverses Jury Verdicts and Findings

Defendant appealed to the Appellate Court of Illinois for the Third Judicial District and on December 29, 1978, that Court issued an opinion reversing the $1,787,491.05 judgment entered in favor of plaintiff on the verdicts of the jury. The Court held that defendant was entitled to

judgment as a matter of law on both counts of the complaint. It set aside the judgment entered in favor of the plaintiff on the jury verdicts and entered judgment in favor of defendant. Plaintiff filed a petition for rehearing, pointing out that the basis of the Court's ruling on the negligence count—that plaintiff had assumed the risk of the car—could not constitute a defense to a negligence action in Illinois (*Barrett* v. *Fritz*, 42 Ill.2d 529) and further that defendant did not plead assumption of risk as a defense to the negligence count, did not argue assumption of risk in the trial court or in the Appellate Court, and that the jury was never instructed on that issue.

Thereupon, on February 14, 1979, the Appellate Court issued a "revised" opinion eliminating the assumption of risk holding on the negligence count but nevertheless entering judgment as a matter of law in favor of defendant and against plaintiff, holding that:

1. Defendant was not negligent in rebuilding the car as a matter of law,
2. Car CB&Q 182544 was not defective as a matter of law,
3. Car CB&Q 182544 was not unreasonably dangerous as a matter of law, and
4. Plaintiff assumed the risk of the defective bearing as a matter of law.

In the same order, the Court withdrew its opinion of December 29, 1978, and denied plaintiff's petition for rehearing.

ARGUMENT

APPEAL AS A MATTER OF RIGHT

I.

BY SUMMARILY REVERSING THE JUDGMENT ENTERED ON THE VERDICTS AND SPECIAL FINDINGS OF THE JURY, THE APPELLATE COURT HAS DEPRIVED PETITIONER OF ITS CONSTITUTIONAL RIGHT TO TRIAL BY JURY.

This appeal is taken as a matter of right pursuant to Supreme Court Rule 317 since the Appellate Court's decision raises "for the first time" questions under Art. 1, § 13 of the Illinois Constitution of 1970 and Amendment VII of the United States Constitution providing in pertinent part as follows:

> "The right of trial by jury as heretofore enjoyed shall remain inviolate." (Ill. Const. Art. 1, § 13)
>
> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." (U. S. Const. Amend. 7)

The Appellate Court substituted its view of the facts for that of the jury on each of the two verdicts while at the same time refusing to follow the standard enunciated by this Court for setting aside such factual determinations by a jury. *Pedrick* v. *Peoria and Eastern R.R. Co.*, 37 Ill.2d 494, 510 (1967); *Jardine* v. *Arthur Rubloff*, 73 Ill.2d 31, 36 (1978).

Each issue discussed in the revised Appellate Court opinion—negligence, defective and unreasonably dangerous condition, assumption of risk—was the subject of days and weeks of disputed evidence and testimony. At the conclusion of the evidence, counsel for both sides argued their version of the facts to the jury. Each fact issue was then submitted to the trier of fact—the jury. The jury returned separate verdicts and special findings in favor of the plaintiff and against defendant on each count of the complaint.

Nevertheless, the Appellate Court summarily set aside both jury verdicts and in essence held that plaintiff never even had the right to a jury trial on its complaint. Under these circumstances, constitutional deprivation is apparent. In *Tenneant* v. *Peoria & P.U. Ry.*, 321 U.S. 29 (1944), the United States Supreme Court reversed the judgment of the Court of Appeals which had reversed a jury verdict in favor of plaintiff in an FELA case. The language of the Court, equally applicable to the direct appeal in the case at bar, was as follows:

> "It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Washington & Georgetown R. Co.* v. *McDade*, 135 U.S. 554, 571, 572; *Tiller* v. *Atlantic Coast Line R. Co.*, supra, 68; *Bailey* v. *Central Vermont Ry.*, 319 U.S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

> Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for the respondent notwithstanding the verdict *is to deprive petitioner of the right to a jury trial.*" (Emphasis added)

Aside from the constitutional infringement engendered by the Appellate Court's outright reversal, the Appellate Court's substitution of its view of the facts in the place of and above the findings of the jury contravenes the decisions of this Court setting forth the standard for Appellate review of jury verdicts. Specifically in *Pedrick* v. *Peoria & Eastern R.R. Co., supra,* 37 Ill.2d at 510 and *Jardine* v. *Rubloff, supra,* 73 Ill.2d at 36 this Court held:

> "In our judgment verdicts ought to be directed and judgments *N.O.V.* entered only in those cases in which all the evidence when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand."

In the instant case, the Appellate Court neither cited nor followed the *Pedrick* rule, but simply urged its view of the evidence in support of a verdict for the defendant. Such a disregard of the *Pedrick* rule was the basis of this Court's reversal of the Appellate Court in *Jardine, supra* (73 Ill.2d at 36).

A. The Evidence Supported The Jury's Verdict On The Issue Of Whether Defendant's Acts And Omissions During The 1969 Rebuilding Of Car CB&Q 182544 Constituted A Failure To Exercise Ordinary Care.

Plaintiff's negligence case was based on evidence which "when viewed in its aspect most favorable" to plaintiff, *Pedrick, supra,* established the following:

1) In 1969 Burlington brought car CB&Q 182544 into its Havelock, Nebraska, shop for "rebuilding" (A. 407);

2) In 1969 and for years prior thereto roller bearings were available which greatly reduced the possibility of a hot box failure on freight cars and, by the mid-1960's, the entire railroad industry was in the process of converting plain bearing cars to the safer roller bearings (A. 301, 440);

3) Prior to 1969 the AAR (Association of American Railroads) had required that roller bearings be installed exclusively on all new cars built after August 1, 1968 (BE 41) (A. 403);

4) For at least 10 years prior to 1969, Burlington itself had installed roller bearings exclusively on all new freight cars manufactured at its Havelock shops (A. 408);

5) In 1969 Burlington had at its Havelock shop all the equipment necessary to convert to roller bearings and subsequently made roller bearing conversions on all its older freight cars (A. 375, 385, 632);

6) Roller bearing conversion of the car would have been even easier than usual since it was already dismantled and the trucks containing the bearings had been completely removed and disassembled (A. 385);

7) Burlington's own assistant shop superintendent suggested to his superintendent that roller bearings be installed on the car*;

8) Nevertheless, Burlington saved the cost of conversion and installed plain bearings on the rebuilt

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* This testimony was first given during plaintiff's Section 60 examination of defendant's Assistant Superintendent E. J. Spomer (A. 375). Later, during defendant's case, Spomer claimed that his recommendation had been made in 1971 or 1972 long after the cars had already been rebuilt (A. 530).

car thereby exposing the public, including other railroads, to the hot box hazards resulting in this accident*.

On these facts, the issue framed for the jury was clear—Was the defendant's conduct in rebuilding car CB&Q 182544 with obsolete plain bearings in 1969 when a practical and much safer alternative was not only readily available but recommended by the entire industry "something which a reasonably careful person would do?" (I.P.I.2d § 10.01, Plf's Inst. No. 11, A. 152-153, Deft's Inst. No. 34, A. 171).

The jury's verdict in favor of plaintiff on the negligence count of the complaint answered that question and that answer was fully supported by the evidence.

B. The Evidence Supported The Jury's Finding That Car CB&Q 182544 Was Defective And Unreasonably Dangerous.

Without citing *Pedrick*, applying the *Pedrick* test, discussing plaintiff's evidence or analyzing the issue, the Appellate Court stated at p. 8: "The design of Car CB&Q 182544 did not create a condition that was unreasonably dangerous to plaintiff." Contrary to this statement, the evidence "viewed to its aspect most favorable to the plaintiff" established that Burlington's installation of hot box prone plain bearings on car CB&Q 182544 in February of 1969—when safer roller bearings had long since been available and recommended throughout the industry, when Burlington for the preceding 10 years had put roller bearings

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* Plaintiff's expert testified that the accident would not have occurred if roller bearings had been on the car (A. 480).

on all its newly manufactured cars—created an *unreasonably* dangerous condition which brought about the instant occurrence, and the jury expressly so found by their separate verdict in favor of plaintiff on the strict liability count of the complaint.

The availability and feasibility of an alternative device or design which, more likely than not, would have prevented the occurrence is the essence of proof in any strict liability design case. In *Wells* v. *Webb Machinery Co.*, 20 Ill.App.3d 545 (1st Dist. 1974), the actual cause of a punch press accident was the failure of a limit switch which was not manufactured by defendant. However, the jury verdict against defendant was affirmed on the ground that defendant could have adopted an alternative design which would have prevented an accident when the switch failure occurred. In *Rivera* v. *Rockford Machine & Tool Co.*, 1 Ill. App.3d 641 (1st Dist. 1971), the actual cause of a punch press accident was the breaking of a replacement piston rod that had not been manufactured by defendant. Nevertheless, the jury verdict against the defendant manufacturer was affirmed since the evidence established that an alternative design was available which would not have stressed the rod as much as the design used by defendant. See also *Gelsumino* v. *E. W. Bliss Co.*, 10 Ill. App.3d 604 (1st Dist. 1973); *Neal* v. *Whirl Air Co. Corp.*, 43 Ill. App. 3d 266 (3rd Dist. 1976); *Scott* v. *Dreis & Krump Mfg. Co.*, 26 Ill. App.3d 971 (1st Dist. 1976).

In the recent case of *Anderson* v. *Hyster Co.*, 74 Ill.2d 364, this Court affirmed a strict liability verdict for defective design against a forklift manufacturer, noting at 368:

> "That a product was not reasonably safe by reason of defective design may be proved, *inter alia*, by evidence of the availability and feasibility of alternate designs at the time of its manufacture, or that the design used did not conform with the design standards of the industry, design guidelines provided by an authoritative voluntary association, or design criteria set by legislation or governmental regulation."

Similarly, in the case at bar, plaintiffs' evidence showed *inter alia* that the alternative design (roller bearings) was both feasible and available at the time and place that car CB&Q 182544 was rebuilt and that roller bearings had long since been the "standard" of the industry. The fact that in 1969 no rule or law actually required roller bearings on 70-ton hopper cars was simply an element for the jury to consider. Indeed, in another recent decision, *Rucker* v. *Norfolk & W. Ry.*, ... Ill. App.3d ....., 381 N.E.2d 715 (5th Dist. 1978), the Appellate Court upheld a strict liability verdict for defective design against a tank car manufacturer for failure to install a protective shield at the head of the car even though such "headshields" were not required by any rule or law and were not at all widely used in the industry.

Here, the evidence showed that the use of an alternative design (roller bearings) would significantly reduce hot box occurrences from all causes, and the evidence was certainly sufficient for the jury to find that the instant derailment would never have occurred if roller bearings had been on the car as Professor Willis expressly testified (A. 480). Countless cases have held that a manufacturer's failure to use an alternative design or an available safety feature on its product presents at least a question of fact for the jury under the strict liability theory. See *Gelsumino* v. *E. W. Bliss Co.*, 10 Ill.App.3d 604 (1st Dist. 1974); *Neal* v. *Whirl Air Flow Corp.*, 43 Ill.App.3d 266 (3d Dist. 1976); *Scott* v. *Dreis & Krump Mfg. Co.*, 26 Ill. App.3d 971 (1st Dist. 1975); *Rivera* v. *Rockford Machine & Tool Co., supra*, 1 Ill.App.3d 641 (1st Dist. 1971); *Wells* v. *Webb Machinery Co., supra*, 29 Ill.App.3d 545 (1st Dist. 1974).

Furthermore, under this Court's holding in *Tweedy* v. *Wright Ford Sales, Inc.*, 64 Ill.2d 570 (1976), a *prima facie* strict liability case is established by proving the failure of the product to perform in the manner reasonably to be expected in light of its nature and intended function (64 Ill.2d at 574). *See also*, this Court's recent opinion in *Gillespie* v. *R. D. Werner Co., Inc., supra*, 71 Ill.2d 319, reaffirming the *Tweedy* rationale. Moreover, a defective condition is a "condition not contemplated by the ultimate consumer which will be unreasonably dangerous to him." Restatement, Torts 2d § 402A, Comment *g*. Burlington's own witness established that new plain bearings ought to last 1.5 million miles (A. 594). Instead, four out of the eight bearings on car CB&Q 182544 failed in the first 16,000 miles of use, and the last failure caused the catastrophic derailment at Crescent City. There is no way it can fairly be said that, as a matter of law, a condition where 50% of the bearings fail within 1% of their expected service life was a condition "contemplated" by plaintiff, and the Appellate Court's reliance on Restatement, Torts 2d § 402A, comment *g*, (Opinion, p. 6) in reversing the jury verdict as to Count I is obviously misplaced. Plaintiff was entitled to the jury verdict it received.

C. The Issue Of Assumption Of The Risk Was For The Jury To Decide.

The issue of assumption of the risk, raised as a defense to the strict liability count only,* again manifests the Appellate Court's refusal to follow the *Pedrick* standard. The Appellate Court stated at page 6:

> "At trial there was ample evidence that plaintiff knew full well the risks and dangers of transporting freight cars equipped with solid bearings . . ."

But, "ample evidence" does not satisfy the *Pedrick* standard for overruling a jury finding. In a strict liability case, assumption of the risk is an affirmative defense to be pleaded and proved by defendant. *Williams* v. *Brown Mfg.*, 45 Ill.2d 418. By its verdict in favor of plaintiff on Count I, the jury found that the defense had not been proved. The Appellate Court was not free to overturn this verdict simply because in its view there was "ample evidence" to support its conclusion.

Moreover, while the evidence arguably established that plaintiff knew the car was equipped with plain bearings, the evidence certainly did not establish that plaintiff knew that the car had been completely dismantled and rebuilt in 1969 at facilities equipped to make roller bearing conversions, nor did it establish that plaintiff knew that this particular car had suffered failures in three out of eight plain bearings in its first 16,000 miles of use after being returned to service in 1969. In *Karabatsos* v. *Spivey Co.*, 49 Ill.App. 3d 317 (1st Dist. 1977) and *Christopherson* v. *Hyster Co.*,

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* Assumption of the risk is not a defense to a negligence action in Illinois, *Barrett* v. *Fritz*, 42 Ill.2d 529 (1969), and defendant did not plead or argue the issue with respect to the negligence count of the complaint (A. 24-26, 167).

58 Ill.App.3d 791 (1st Dist. 1978), the Appellate Court affirmed jury verdicts in favor of plaintiffs in strict products liability cases and held as a matter of law that an appreciation of a general possibility of danger does not constitute assumption of risk.

Furthermore, it is well settled that assumption of the risk in a strict liability action is established only if plaintiff "voluntarily and unreasonably" encounters a known risk, *Williams* v. *Brown Mfg. Co.*, 45 Ill.2d 418, 423 (1970); *Doran* v. *Pullman Standard Car Mfg. Co.*, 45 Ill. App.3d 981 (1st Dist. 1977); *Scott* v. *Dreis & Krump Mfg. Co.*, 26 Ill.App.3d 971 (1st Dist. 1975). Although the interchange agreement did not obligate Burlington to rebuild plain bearing cars in 1969, it did obligate the plaintiff to accept a car which meets the minimum requirements of these rules. Refusing to accept a car meeting these minimum requirements would effectively put TP&W out of the freight hauling business. But TP&W is not even free to go out of the freight hauling business, for to do so would violate the Interstate Commerce Act, which provides that, "It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation . . ." 49 USC § 1 (4). Violation of the statute can subject the carrier to suit for damages, including attorney's fees. 49 USC § 8.

A common carrier railroad can hardly be said to be "unreasonable" in discharging its duty to furnish transportation under Federal law. If a railroad is forced to accept a car which meets certain minimum rules and requirements, having no standing to participate in the decision-making process whereby the rules are drafted because it is not a voting member of the organization promulgating the rules (see discussion *infra*) it cannot be said as a matter of

law to be "voluntarily and unreasonably" encountering a known risk. See *Doran* v. *Pullman Standard Mfg. Co., supra,* 45 Ill. App.3d at 989 and *Scott* v. *Dreis & Krump Mfg. Co.,* 26 Ill. App.3d at 990, both holding that job-compulsory activity did not constitute assumption of the risk.

At best, the assumption of risk defense, including the alleged "voluntariness" and "unreasonableness" of plaintiff's conduct, was for the jury to decide.

D. None Of The Authorities Cited By The Appellate Court Justify Its Rejection Of The Jury's Verdicts.

The Appellate Court cites three cases, one on the negligence issue and two on the issue of strict liability.

To support its reversal of the negligence verdict, the Appellate Court relies on *Watts* v. *Bacon & Van Buskirk Glass Co.,* 18 Ill.2d 226 (1959), affirming a directed verdict in favor of a glass manufacturer who had installed plate glass instead of tempered glass in a drug store door in accordance with instructions from the owners of the store. Not only was the glass company simply carrying out a purchase order, but the evidence showed that "plate glass installation was customary and usual while the use of tempered glass was exceptional" (18 Ill.2d at 231). Obviously, the instant case and *Watts* are wholly different cases. Here, the only party who ordered or chose to rebuild car CB&Q 182544 with obsolete plain bearings was the defendant. Conversion to roller bearings was not exceptional—it was the standard to which the entire railroad industry was attempting to comply! Defendant showed not a single other instance where any railroad in 1969 was still installing plain bearings on any new

or rebuilt cars. On the contrary, the evidence showed that other railroads were converting their fleets to roller bearings as fast as was feasible. Defendant itself had installed roller bearings exclusively on all its new cars for the preceding 10 years. In short, the factors establishing the propriety of the directed verdict in *Watts* establish the propriety of the jury verdict in the case at bar.

With respect to the strict liability verdict, the Appellate Court cites *St. Louis S.F. R.R.* v. *Armco Steel Corp.,* 490 F.2d 367 (8th Cir. 1974) and *Torres* v. *Southern Pacific Transportation Co.,* 584 F.2d 900 (9th Cir. 1978). *Armco Steel* was not a design case at all, but involved a claim that defendant's wheel contained a manufacturing defect (excessive pitting). The expert opinion on this point was in conflict, the trial court as fact finder found in favor of the defendant, and the Court of Appeals affirmed the trial court's findings. If anything, *Armco* supports the submission of the instant case to the jury and affirmance of the jury's verdicts.

Torres involved an action by two trespassing illegal aliens hitching a ride on defendant's freight car who were injured in a hot box derailment. Unlike the case at bar, there was no evidence that any "unreasonable" conduct on the part of the defendant was responsible for the hot box (the type of bearings involved were not even identified), and the case was decided under Arizona law which *unlike Illinois* does not apply the strict liability doctrine to the lessor of a defective chattel (584 F.2d at 902). See, *Crowe* v. *Public Building Commission of Chicago,* 74 Ill.2d 10; *Galluccio* v. *Hertz Corp.,* 1 Ill.App.3d 272 (5th Dist. 1971); *Knapp* v. *Hertz Corp.,* 59 Ill.App.3d 241 (1st Dist. 1978).

II.

THE APPELLATE COURT'S OPINION DEPRIVES PLAINTIFF OF ITS CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF LAW.

The Appellate Court's opinion, besides setting aside two jury verdicts without any basis in law or fact for doing so, also in essence holds that railroads, regardless of their damage, are not entitled to pursue a remedy and cause of action (strict liability in tort) that is available to all other plaintiffs in this state. Such a result is in violation of the due process and equal protection clauses of both the Illinois and U. S. Constitutions. Ill. Const. Art. I, § 2; U. S. Const., Amend. XIV.

Certainly, the fact that plaintiff is a business entity and not an individual "member of the general public" (Appellate Court Opinion, p. 11) does not justify unequal treatment or deprive it of its strict liability remedy. Indeed, the posture of this case is not unlike that in *Suvada* v. *White Motor Co.*, 32 Ill.2d 612 where this Court first adopted the strict liability doctrine. In *Suvada,* a milk service company was allowed to maintain a strict liability in tort indemnity action against the manufacturer-seller of the milk truck for amounts paid by the milk company in settlement of personal injury suits brought by persons injured in a collision between the milk truck and a bus. In *Liberty Mutual Insur. Co.* v. *Williams Machine and Tool Co.*, 62 Ill.2d at 77 (1975), the subrogee insurer of a manufacturing corporation, who assembled and sold a defective work platform, settled an injured workman's claim and then was allowed to obtain indemnity under the strict liability doctrine from the company that manufactured the defective hydraulic pump installed on the platform. In

Texaco v. *McGrew Lumber Co.*, 117 Ill App.2d 351 (1st Dist. 1969), the strict liability doctrine was expressly applied to *two business entities in the same industry,* the court holding that one lumber company in the distributive chain of a defective plank could obtain indemnity from another lumber company which originally supplied the plank (117 Ill.App.2d at 357-358).

The Appellate Court's opinion also notes the existence of the AAR Interchange Agreement governing the interchange of freight cars between railroads. The interchange agreement, including the duty of the handling railroad to inspect cars received in interchange, was introduced in evidence and argued to the jury. Nothing in the AAR agreement, however, even deals with, much less precludes, one railroad's right to recover under the strict liability theory for damage incurred as a result of an unreasonably dangerous condition of a freight car leased into service by another railroad. In fact, Article 17 of the AAR's plan of organization expressly provides that:

> Article 17. Nothing this plan shall in any way prohibit or restrain any member road from acting individually and independently of the Association or of any and all other member roads with respect to any of the matters covered hereby, and the right of individual and independent action is expressly reserved to each member road. (Supp. BE 50)

The interchange rules themselves were designed to provide a means for prompt payment for repairs to and damage sustained by *freight cars.* (A. 561-562). Beyond this point, the rules do not go. These rules do not attempt to exonerate the car owner from any liability that may result from a dangerous condition on a freight car, which results in personal injuries or property damage sustained

by others. These rules do not attempt to preclude a "Handling Company" (such as TP&W) from suing a car owner, manufacturer or rebuilder (such as Burlington) for any losses or damage sustained by "Handling Company" as a result of a defective condition of a freight car which was caused or contributed to by the car owner, manufacturer or rebuilder.

Contrary to the instant Appellate Court decision, other courts that have considered the AAR interchange agreement have interpreted the agreement according to its terms and held that it does *not* preclude common law actions for damages between railroads under any theory. For example, in *Southern Cotton Oil Co.* v. *Atlantic C.L.R.R.*, 17 F.2d 411 (E.D. Va. 1927) the court held:

> An examination of the rules from beginning to end shows that the purpose of their adoption was, as stated in the preface, to make the car owner chargeable with repairs under certain given circumstances and the railroad chargeable with repairs under certain other given circumstances, and to provide a means of securing the repairs and allocating the cost of same. Elaborate provisions are contained in the rules with relation to the character of equipment of the cars and the method of handling the cars when defects are discovered, whether loaded or unloaded, and like matters. In other words, *the intent and purpose of the rules is to provide for the interchange of cars, and in no sense do they relate to or were they intended to cover the question of responsibility between the parties* in relation to the contents of the same *or to alter or modify the existing law with relation to such matters.* If, therefore, as the result of a failure to properly inspect a car in transit on its railroad or to handle the same with due care, damage ensues, the railroad company will be liable. If, on the other hand, loss is sustained by some hidden defect in the car, undiscoverable

> in the exercise of due care, the railroad company will not be responsible. (17 F.2d 411, 413) (*Emphasis added.*)

In *Chicago, R.I.&P. R.R.* v. *Chicago and N.W. Ry.,* 280 F.2d 110 (8th Cir. 1960), the court held the Interchange Rules did not prevent a railroad in possession of a freight car from suing another railroad for contribution towards the settlement of a claim for personal injuries suffered by an employee of the railroad in possession. The court concluded that the interchange rules:

> ". . . do not operate as a waiver of or a bar to any claim for indemnity or contribution that the plaintiff might have against the defendant arising out of the mishap." (280 F.2d 110, 113) (Emphasis added)

Most recently in *Maine C. R.R.* v. *Bangor & A. R.R.,* ..... Me. ....., 395 A.2d 1107 (1978), the Maine Supreme Court reached the same conclusion in an action to confirm an arbitrators' award for damages incurred by the Maine Central whose train derailed because of a defect in a Bangor & Aroostook freight car. Both railroads were parties to the AAR Interchange Agreement at the time of the occurrence. After holding at 1132 that the arbitrators "did nothing more than give their authoritative opinion that initial responsibility for the damaged cars lay with Maine Central", the Court went on to hold that "Maine Central is entitled to pursue its legal remedies with respect to the alleged products liability claim." To the same effect see *Missouri Pacific* v. *Southern Pacific,* 430 S.W.2d 900 (Tex. App. 1968), holding that one railroad's contractual duty to inspect a car did not prevent it from obtaining indemnity for amounts paid to an injured employee from the railroad that actually supplied the defective car in which the employee was injured.

Different treatment of different classes is constitutionally permissible only where there is "a rational difference of condition or situation existing in the persons or objects upon which the classification rests", *Davis* v. *Commonwealth Edison Co.*, 61 Ill.2d 494, 497 (1975). Here neither the AAR Agreement nor any other factor justifies treating railroads differently from any other plaintiff or depriving them of the remedy afforded under the strict liability doctrine.

PETITION FOR LEAVE TO APPEAL

I.

THE APPELLATE COURT'S OPINION CONFLICTS WITH DECISIONS OF OTHER APPELLATE DISTRICTS IN THIS STATE.

In addition to the conflicts with the decisions of this Court and of other states, discussed in detail *supra,* this decision of the Appellate Court conflicts with the other Appellate Districts in two significant respects.

A. Illinois Decisions Consistently Hold That Contractual Defenses To Strict Liability Actions Are Not Recognized.

While no other Illinois decision has considered the impact of the Interchange Agreement on a railroad's right to strict liability recovery, numerous Illinois decisions have held that contractual defenses to strict liability are *not* allowed.

> "[L]iability in a strict liability action is imposed independent of contractual considerations, and the one

> liable cannot contract away his own responsibility for having placed a defective product into the mainstream of public use. *Sipari* v. *Villa Olivia Country Club, et al.*, 63 Ill. App.3d 985, 990 (1978).
>
> "[I]mplicit in the reasoning of the cases imposing strict liability is that 'liability is imposed by law and the refusal to permit the manufacturer to define the scope of its own responsibilities for defective products.' " *Wright* v. *Massey Inc.*, 68 Ill. App.2d 70 (1968).
>
> [T]he court in *Suvada* recognized that sound reasons of public policy were responsible for the extension in a number of jurisdictions of strict liability to manufacturers of products whose defective condition makes them unreasonably dangerous to the user. To allow the dealer to limit, by contract, his tort liability for such defects in [a product] to the repair or replacement of defective parts would defeat those reasons." *Haley* v. *Merit Chevrolet, Inc.*, 67 Ill. App.2d 19 (1966).

Likewise the Restatement of Torts 2d §402(a) comment *m* expressly provides:

> The consumer's cause of action . . . is not affected by any disclaimer *or other agreement,* whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands. (*Emphasis added*)

In short, even if the AAR Rules attempted to relieve Burlington, as manufacturer and distributor of a defective and dangerous railroad car, of its duties and liabilities under Illinois law (which the Rules do not even purport to do), such an attempt would be contrary to the public policy of this state. The Appellate Court's attempt to justify its result on the basis of these Rules should therefore be reversed as a matter of public policy.

B. This Decision Creates A Direct Conflict Between The Third And Fifth Districts.

The Appellate Court, at p. 11, stated:

> "[T]he interchange of railroad cars is a highly specialized industry use which is too dissimilar to the commercial distribution of a product to warrant application of the doctrine of strict liability."

The sole authority cited by the Appellate Court for this proposition is *Torres* v. *Southern Pacific Transp. Co.*, 584 F.2d 900 (9th Cir. 1978), discussed *supra*, p. 26, a case bearing little or no factual resemblance to the instant case.

The Appellate Court of Illinois, Fifth District, very recently decided *Rucker* v. *Norfolk & Western Ry.*, ... Ill. App.3d ....., 381 N.E.2d 715 (1978), holding that a railroad car manufacturer is strictly liable to one injured by its defectively-designed railroad car, even though the car had been interchanged to other railroads and was assertedly manufactured in conformance with federally prescribed design standards and specifications. The *Rucker* holding is consistent with the overwhelming weight of prior Illinois authority in this regard, as discussed at length *supra*.

It is respectfully submitted that this conflict between the Third and Fifth Districts should be resolved by this Court.

CONCLUSION

The Appellate Court has reversed two jury verdicts, each separate and independent of the other, and has done so without citing *Pedrick*, applying the *Pedrick* test, or discussing or analyzing the plaintiff's evidence. The petition for appeal as a matter of right is well made and should be allowed. In the alternative, the petition for leave to appeal should be granted.

Respectfully submitted,

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Peoria, Illinois 61602

Attorneys for Petitioner,
Toledo, Peoria & Western Railroad

CORNELIUS P. CALLAHAN
ROBERT P. SCHMIDT
HUGH C. GRIFFIN
Of Counsel.

APPENDIX 5

Illinois Supreme Court Denial of Petition for Leave to Appeal

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

May 31, 1979

Mr. Cornelius P. Callahan
Attorney at Law
Lord, Bissell & Brook
115 South LaSalle Street
Room 3200
Chicago, IL 60603

No. 51806—Toledo, Peoria & Western Railroad, a corp., petitioner, vs. Burlington Northern, Inc., a corp., respondent. Leave to appeal, Appellate Court, Third District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,
/s/ Clell L. Woods
Clerk of the Supreme Court

APPENDIX 6

In the Supreme Court of Illinois

TOLEDO, PEORIA & WESTERN RAILROAD, a corporation,
Plaintiff-Petitioner,

No. 51806 vs.

BURLINGTON NORTHERN INC., a corporation,
Defendant-Respondent.

Petition for Appeal as a Matter of Right from the Appellate Court of Illinois, Third District.
There Heard on Appeal from the Circuit Court of Peoria County.
Honorable Albert Pucci, Judge Presiding.

Motion for Ruling on Petition for Appeal as a Matter of Right

Now comes plaintiff-petitioner, Toledo, Peoria and Western Railroad Company, by its attorneys, Lord, Bissell & Brook, and moves the court to rule on and grant the Petition for Appeal as a matter of Right which has heretofore been filed in this court. The order of the court of May 31, 1979, deals only with the alternative petition for leave to appeal.

In the appeal as a matter of right, plaintiff demonstrated that the Appellate Court summarily set aside two separate

and independent $1,787,491.05 jury verdicts which had been returned after some three weeks of trial before a jury in Peoria, Illinois. This result wholly abrogated plaintiff's federal and state constitutional rights of trial by jury and constituted the basis for the Petition for Appeal as a Matter of Right. The order disposing of the alternative petition for leave to appeal does not even deal with this fundamental constitutional question raised for the first time by the Appellate Court's ruling.

The Appellate Court justified its reversal of the jury verdicts on the grounds that there was "ample evidence" by which the jury could have found for the defendant instead of the plaintiff. But there is no "ample evidence" rule in this State which entitled the Appellate Court to substitute its view of the facts for that of the jury. Rather, the rule in this State is enunciated in the *Pedrick* case, and the Appellate Court not only refused to follow that rule but demonstrated its disregard for it by failing even to cite *Pedrick* in its opinion.

WHEREFORE, plaintiff moves the court to grant its Appeal as a Matter of Right.

LORD, BISSELL & BROOK
/s/ Lord, Bissell & Brook
Attorneys for Plaintiff-Petitioner,
Toledo, Peoria and Western Railroad

CORNELIUS P. CALLAHAN
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115 South LaSalle Street
Chicago, Illinois 60603
(312) 443-0409

APPENDIX 7

Illinois Supreme Court
Denial of Motion for Ruling

State of Illinois
office of
CLERK OF THE SUPREME COURT
Springfield
62706

June 27, 1979

Lord, Bissell & Brook
Attorneys at Law
115 South LaSalle Street
Chicago, IL 60603

In re: Toledo, Peoria & Western Railroad, etc., petitioner, vs. Burlington Northern, Inc., etc., respondent. No. 51806

Gentlemen:

The Supreme Court today made the following announcement concerning the above entitled cause:

Motion by petitioner suggesting that Justice Thomas E. Kluczynski recuse himself from consideration of this case. No action is taken by the Court as a whole, since none is requested and action by the Court would not be appropriate. Kluczynski, J. took no part.

The motion by petitioner for a ruling on petition for appeal as a matter of right is denied. Kluczynski, J. took no part.

The motion by petitioner for stay of mandate pending disposition of motion for a ruling on petition for appeal as a matter of right is denied. Kluczynski, J. took no part.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

CLW:jae
cc:Cassidy, Cassidy, Mueller
& Price
Davis & Morgan
Burlington Northern Inc.